No. 80-2157

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IN THE

Supreme Court of the United States

October Term, 1981

ANCHORAGE TIMES PUBLISHING CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. RIGGS
Attorney for Petitioner

BOGLE & GATES
900 West Fifth Avenue
Suite 525
Anchorage, Alaska 99501
Telephone (907) 276-4557

QUESTIONS PRESENTED

1. Should circumstances subsequent to the date of the representation election, such as employee and supervisor turnover, be considered and weigh against the fashioning and enforcement of a bargaining order?

2. Should present circumstances, including the lapse of time, be considered and weigh against the enforcement of a bargaining order?

3. Was is correct and appropriate for the Ninth Circuit to enforce a bargaining order notwithstanding changed circumstances in the turnover in employees and supervisors between the date of the representation election and the decision and order of the National Labor Relations Board (NLRB), the existence of a close question on whether the union enjoyed majority status prior to the election and the existence of a close question on whether the unfair labor practices adversely affected employee support for the union at the time of the election and thereafter?

4. Was it correct and appropriate for the Ninth Circuit to enforce a bargaining order without remanding the case for the purpose of taking additional evidence on the changed circumstances?

LIST OF PARTIES

The petitioner is the Anchorage Times Publishing Company, an Alaskan corporation with its principal headquarters in Anchorage, Alaska. The National Labor Relations Board (NLRB) is an agency of the United States government with its headquarters located in Washington, D.C. that is charged with administering the provisions of the National Labor Relations Act.

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I.

OPINION OF COURT AND ADMINISTRATIVE AGENCY BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 637 F.2d 1359 (1981). The decision and order of the National Labor Relations Board is reported at 237 NLRB 544 (1978). (The opinion of the Ninth Circuit and the decision and order of the NLRB are in the Appendix hereto.)

II.

GROUNDS FOR JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) and 29 U.S.C.A. § 160(e).

The Ninth Circuit's opinion was filed on February 27, 1981. The court denied a Petition for Rehearing on April 29, 1981. The judgment sought to be reviewed by this Court became final on April 29, 1981. The Ninth Circuit, by an order filed on May 28, 1981, denied petitioner's motion to stay the mandate for thirty days to permit this petition to be filed.

III.

STATUTES INVOLVED

28 U.S.C.A. § 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 U.S.C.A. § 160(e) provides in part as follows:

> The Board shall have power to petition any court of appeals of the United States, . . . for the enforcement of such order . . . and shall file in the court the record in the proceedings. . . . Upon the filing of such petition, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, . . . and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . . the court may order such additional evidence to be taken before the Board, . . . and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

IV.

STATEMENT OF THE CASE

The petitioner is Alaska's largest newspaper publishing company with its primary offices in downtown Anchorage. During the late summer and fall of 1976, an organizing campaign was conducted among the petitioner's employees by the International Brotherhood of Electrical Workers, Local 1547 AFL-CIO. On November 15, 1976, the union filed with the NLRB a petition requesting a representation election.

The NLRB found that the unit contained 181 employees on November 15, 1976. Further, by that date, the union had

obtained 97 valid authorization cards,[1] a union majority requiring 91 cards.

The NLRB election was held on January 20, 1977. The employees voted 77-73 against the union with 16 ballots challenged. The Regional Director issued a supplemental decision with a revised tally showing a vote of 88 to 74 against the union. The union filed unfair labor practice charges against the petitioner on January 17, 1977 and January 24, 1977, contending that before and during the election campaign the petitioner committed unfair labor practices. These charges were heard before an administrative law judge. The trial concluded on July 26, 1977. The administrative law judge recommended, *inter alia*, to the NLRB that the election be set aside and the petitioner be ordered to bargain with the union. The NLRB, with minor modification, adopted the recommendation. The NLRB petitioned the Ninth Circuit to enforce its order.

The Ninth Circuit affirmed the decision and order of the NLRB.

The petitioner filed a timely Petition for Rehearing requesting the court to not enforce the bargaining order because of the changed circumstances of turnover in employees and supervisors between the date of the NLRB election and

1. It is the petitioner's position that fourteen of the cards were invalid. The petitioner believes that eleven of the cards were invalid as authorization cards because the employees who signed them believed the cards only represented a request for an election and not an authorization for the union to represent them in collective bargaining. As to four of the cards the Ninth Circuit affirmed the position of the NLRB, but did so with implicit reservation by suggesting that there was countervailing evidence as to whether they were valid authorization cards. 637 F.2d at 1369. As to the other seven cards, the Ninth Circuit affirmed the conclusion of the NLRB because even though those employees had testified that the only purpose for signing the cards was to obtain an election, they were not able to testify that they had been told by the card solicitor that the only purpose was for an election. 637 F.2d at 1369.

the NLRB decision. This argument was particularly significant because of the closeness of the question on whether a union majority existed before the election. In short, the petitioner asked the Ninth Circuit to reconsider its decision because of the decision of the Seventh Circuit in *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980) and its own precedent of *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979). In the alternative, the petitioner asked the Ninth Circuit to remand the case for the purpose of taking additional evidence on the changed circumstances.

The Ninth Circuit denied the Petition for Rehearing on April 29, 1981. The petitioner filed a motion to stay the mandate pending the filing of the petition for writ of certiorari. The Ninth Circuit, by an order filed on May 28, 1981, denied petitioner's motion to stay the mandate for thirty days to permit this petition to be filed.

V.

ARGUMENT FOR ALLOWANCE OF WRIT

The Seventh Circuit in *Red Oaks*, the Second Circuit in *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980) and *J. J. Newberry Co. v. NLRB*, 107 LRRM 2018 (2d Cir. 1981), and the District of Columbia Circuit in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980) and *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972) recognized and favorably considered changed circumstances or subsequent events, such as employee and supervisor turnover and lapse of time and present circumstances, as important elements in deciding that a bargaining order was not an appropriate remedy and

refused to enforce such an order.[2] The changed circumstances or present circumstances reflect those factors which characterize the industrial or work environment subsequent to the date of the commission of unfair labor practices by an employer or the representation election and have a bearing on whether employees will be able to exercise a free choice in a rerun election. The Ninth Circuit refused to recognize or favorably consider in this case the changed circumstances and has enforced a bargaining order.

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2. The Second Circuit's position is reflected as follows:

> The issuance by the Board of a bargaining order in lieu of a cease-and-desist order is only proper if, after an objective review of all of the relevant surrounding circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, it may reasonably be concluded that the employees will be unable to exercise a free choice in a Board-supervised re-run election.
>
> . . . .
>
> Although new employees, who would be disenfranchised by bargaining, may gain some protection from their right to file a decertification petition . . . [citations omitted], such a burden should not be imposed upon them in a close case. The nature of the subsequent events and their importance in the particular case should be the yardstick. *NLRB v. Jamaica Towing, Inc., supra,* at 212, 214-15.
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> • • • •
>
> Circumstances may exist where grants of economic benefits, even combined with additional unfair labor practices, are insufficient to support a bargaining order.
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> . . . .
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> . . . [D]espite the Board's apparently continuing refusal to consider subsequent events and current conditions in weighing the need for bargaining orders, we hold that both are relevant. *J. J. Newberry Co. v. NLRB, supra* at 2022.

The District of Columbia Circuit's position is reflected as follows:

> This Court has already held that employee turnover, one "subsequent event," must be considered in deciding whether a new election or a bargaining order is the proper remedy. *Peoples Gas System, Inc. v. NLRB, supra,* note 18 at 46.

The Seventh Circuit's position is reflected by a statement which quotes in part from an earlier decision of that Court in *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1117 (7th Cir. 1973) as follows:

> [W]e expressly noted that "a change in the employee complement may be a relevant consideration in deciding whether to issue a bargaining order." *Red Oaks Nursing Home, Inc. v. NLRB, supra,* at 510.

egregious to automatically require a bargaining order irrespective of whether the union had achieved majority status,[7] all favor considering and giving substantial weight to these changed circumstances.

When all the factors of this case are considered, it is, without doubt, a close case. "[T]urnover . . . mitigates against a bargaining order in close cases." *Red Oaks Nursing Home v. NLRB, supra,* at 510. *Accord, NLRB v. Jamaica Towing, Inc., supra,* at 214-15. Had the Ninth Circuit applied that analysis and principle to this case, it would not have enforced the bargaining order. In fact, by doing so, it contradicted its own precedent in *Western Drug* where changed circumstances were acknowledged as a significant factor which weighs against the enforcement of a bargaining order. "By ignoring the turnover in personnel, the Board denied the present employees the right to choose their bargaining representative. Because the primary objective of the Act is to guarantee employees this right, the Board must not

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for the union. Assuming there were 97 valid authorization cards the 74 employees who cast a ballot in favor of the union constituted 76.2% of the alleged union adherents. If a necessary and reasonable allowance is then made for those approximately 11 employees who signed the cards simply for the purpose for holding an election, then those who voted in favor of the union constituted 86% of those who signed authorization cards.

In *Red Oaks,* 43 of the 78 employees signed authorization cards and 36 of them or 83.7% voted for the union. 663 F.2d at 510. In *Jamaica Towing,* 7 of the 8 employees signed authorization cards and 2 of them, or 28.5%, voted for the union. 632 F.2d at 210. In *J. J. Newberry Co.,* 73 of the 105 employees signed authorization cards and 44 of them, or 60.2%, voted for the union. 107 LRRM at 2019.

7. By the Ninth Circuit's own analysis, the bargaining order would only be appropriate if a union majority existed. 637 F.2d at 1368. Thus, the Ninth Circuit concluded that this case fell into the "second category" of cases which the U.S. Supreme Court characterized as "less extraordinary cases marked by less pervasive practices" where the fashioning of a bargaining order by the NLRB will be approved provided "there is also a showing that at one point the union had a majority." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 613-14 (1969).

routinely place a premium on deterring employer misconduct." *NLRB v. Western Drug, supra,* at 1328.

The Ninth Circuit has placed too high of a premium in this case on deterring employer misconduct without consideration of all the circumstances. In doing so, it has failed to consider whether the enforcement of the bargaining order serves the interest of the employees or is simply a form of punishment against the employer. The enforcement of the bargaining order affects the present not the past employees. A better remedy would be a cease and desist order and a rerun election.

As an alternative to not enforcing the bargaining order, the petitioner requested the Ninth Circuit that if it had doubts as to the sufficiency of the changed circumstances, it remand the case for the purpose of taking additional evidence on that matter pursuant to 29 U.S.C.A. § 160(e). The court refused to do so. Section 160(e) provides a mechanism whereby the circuit court can avoid being placed in a position of mechanically enforcing bargaining orders without benefit of all evidence that must be considered as to whether such an order is appropriate.

VI.

CONCLUSION

The changed circumstances of turnover in employees and supervisors between the date of the election and the date of the NLRB's decision and order should have been considered, and in this close case should have weighed against the enforcement of a bargaining order. The failure of the Ninth Circuit to consider these changed circumstances and apply the analysis to the circumstances of this case has resulted in it mechanically enforcing a bargaining order and placing a premium on deterring past employer misconduct rather than protecting the rights of employees to secretly choose their bargaining representative. This position is inconsistent with the more reasonable positions of the Seventh, Second and District of Columbia Circuits.

Respectfully submitted,

DOUGLAS A. RIGGS
Attorney for Petitioner

APPENDIX FOR ANCHORAGE TIMES PETITION

FOR CERTIORARI

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APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

ANCHORAGE TIMES PUBLISHING CO., Respondent

No. 79-7024

United States Court of Appeals
Ninth Circuit

Argued and Submitted May 8, 1980

Decided Feb. 27, 1981

On Petition to Review and Cross-application to Enforce a Decision of the National Labor Relations Board.

Before ANDERSON and SKOPIL, Circuit Judges, and BYRNE,* District Judge.

BYRNE, District Judge:

The National Labor Relations Board ("the Board") petitions for enforcement of its order against the Anchorage Times Publishing Co. ("the Company" or "the Times"), reported at 237 N.L.R.B. No. 78 (1978). We hold that substantial evidence supports all of the Board's unfair labor practice findings and, accordingly, enforce the Board's chosen remedies, including a bargaining order.

I. BACKGROUND

The Times is Alaska's largest newspaper publishing company, with its primary

*The Honorable Wm. Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by designation.

offices located in a single building in downtown Anchorage. During the relevant period, the Times employed approximately 280 employees in five departments.

During the late summer of 1976, several employees in the editorial department (the newsroom) initiated meetings between high level management officials and newsroom employees to discuss wages and working conditions.[1] Dissatisfied with the results of these meetings, a group of employees sought to find a union willing to represent the Times employees in the accounting, advertising, circulation, and editorial departments. To this end they

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[1] The first meeting was held in early August 1976, the second on September 22, and the third in early October. At these meetings topics included the phasing out of pressroom jobs because of the installation of new electronic equipment, inadequacies of salaries, and the existence of newly-established wage scales and promotion guidelines.

met with William Coleman, a representative of the International Brotherhood of Electrical Workers, Local 1547 AFL CIO ("the Union"), who agreed to help organize a campaign among Times employees in the four departments.

Coleman conducted four meetings with the employees between October 24 and November 5, 1976. At these meetings he solicited employees to sign cards authorizing the Union to represent them for the purpose of collective bargaining with Times management.[2] Coleman explained to the employees that if thirty percent of the

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[2] The Union distributed two different cards to employees. The card handed out at meetings read:

> "AUTHORIZATION FOR REPRESENTATION
>
> I authorize the International Brotherhood of Electrical Workers to represent me in collective bargaining with my employer."

employees in the bargaining unit signed such cards, a petition could be filed for a Board-conducted election. He further explained that if fifty-one percent of the employees in the bargaining unit signed authorization cards, the Union could request the Company to recognize the Union voluntarily as the employee's exclusive bargaining representative, although he cautioned that it was unlikely that the Company would extend such recognition.

(footnote 2 continued)

The other card, which was mailed to employees, read:

> "I REQUEST A GOVERNMENT ELECTION
> I, the undersigned of my own free will, hereby authorize and designate the National Brotherhood of Electrical Workers of the AFL-CIO and CLC to represent me in collective bargaining with my employer in all matters pertaining to rates of pay, hours of employment, and other conditions of employment. This card is also for the purpose of requesting the N.L.R.B. for an election."

The employees were advised by Coleman that by signing the cards they were authorizing the Union to represent them in collective bargaining. Some of the cards were signed by employees at the meetings; others were signed at other locations and returned to the Union.

On November 15, 1976, the Union filed with the Board a petition requesting a representation election. After a hearing, the Regional Director determined that the appropriate bargaining unit contained 181 employees and that 97 valid authorization cards had been signed on or before November 13, 1976.[3] He ordered the election to be held in early January, 1977.

The election was held on January 20, 1977, and the employees voted seventy-seven

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[3] Three additional valid authorization cards were signed by employees on November 14, 1976, making a total of one hundred.

to seventy-three against the Union, with sixteen ballots challenged.[4] The Union filed separate unfair labor practice charges against the Company on January 17, 1977, and on January 24, 1977. The Union contended that, during the course of the campaign, both before and after the Union filed the petition requesting an election, the Company engaged in a course of conduct that included interrogating employees about union sympathies; conducting surveillance of Union-related employee activities; threatening job losses in the event of a vote in favor of the Union; terminating an employee for discriminatory reasons; and granting wage increases immediately prior

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[4] The Regional Director of the National Labor Relations Board issued a supplemental decision on the challenged ballots, overruling twelve challenges, sustaining one and leaving three undetermined. The revised tally showed a vote of eighty-eight to seventy-four against the Union.

to the election in order to influence the employees' votes. These charges were consolidated for hearing before the Board's Administrative Law Judge ("ALJ"). After extensive hearings, he determined that the Company had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1) & 158(a)(3) (1976). The ALJ found that the Union represented a majority of the employees and that the unfair labor practices prevented the holding of a fair "rerun" election. He therefore recommended that the Board set aside the results of the January 20 election and order the Company to bargain with the Union. The ALJ also recommended that one employee, who had been dismissed in violation of the Act, be reinstated and made whole, and that the customary notices be posted. The Board adopted the ALJ's recommendations with

(who supervised the editorial department), City Editor Michael Todd, and Director of Circulation Jules Molenda.[6]

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[6] In early October 1976, reporter Mary Kay Brown approached General Manager Tobin regarding management's failure to reveal wage scales assigned to employee job levels. Tobin asked Brown what kind of conspiracy the newsroom employees were plotting. He advised her that the Times did not expect employees to stay with the newspaper forever and that if she was unsatisfied she could go elsewhere. He also said that if the employees had a union movement going on, it would not be proper for him to talk to her. The ALJ credited Brown's testimony, finding Tobin's remarks to be a "veiled threat that if the employee persisted in her activities, her job status would be in jeopardy."

The Board found that Managing Editor Andrews had interrogated employees in violation of the Act in three instances. In mid-October he called reporter Mary Kay Brown into his office and stated he knew she was involved with the Union. She told him he did not have the right to question her and he answered that he could question her but she did not have to answer. Thereafter the Union organizing committee drafted a note to Andrews warning him not to interrogate employees about Union activities. Andrews also called reporter Frank Gerjevic into his office to inform

The Company raises three objections to the Board's findings that these interrogations constituted unfair labor practices: first, that substantial evidence does not support the factual findings of the Board; second, that the Board erred in finding the interrogations unlawful because there was no evidence that the questioning actually intimidated any

(footnote 6 continued)

him of a raise and to state that he appreciated Gerjevic's work because he was quiet and did not want to vote. Finally Andrews asked another reporter, John Matthews, if he had made up his mind about the Union, noting that it might not be legal for him to ask. Matthews gave an evasive answer.

The Board also found that the City Editor, Michael Todd, had unlawfully interrogated three Times employees, reporter Carl Sampson, reporter William Wilson and his wife Sarah Wilson. These instances were found to violate the Act partially because the Company's animus against the unionization was well known and because no legitimate purpose was served by the questioning.

employees in the exercise of their guaranteed rights; and third, that under the Board's "critical period" doctrine the interrogations conducted before the filing of the election petition should not be considered unfair labor practices or, at

(footnote 6 continued)

In late December, Director of Circulation Jules Molenda divided the duties of the departing office manager in the circulation department among three "group leaders," Elaine Craft, Elaine Moore, and Betty Broste. According to testimony credited by the ALJ, he told them that their jobs were probationary. At the same time he inquired if the three employees were pro-Union, cautioning them that they did not have to answer that question. The Board determined that the question contained an implied threat that the permanence of the promotion depended upon their refusal to support the Union.

The last incident of interrogation occurred when an employee, Lynn Symonds, inquired of the Personnel Manager, Martha Lloyd, if there was a job opening at the Times for her brother. Lloyd asked her if her brother was pro-Union. The Board found that this question carried the implication that the Times considered the Union sympathies of an applicant for employment, despite its official policy to the contrary.

least, should not be relied upon in justifying a bargaining order.

1. Substantial Evidence

After a careful review of the extensive testimony at the hearings before the ALJ, the Court concludes that the Board's determination of facts in each incident is supported by substantial, although not uncontradicted, evidence. The Company points to testimony in the record that would tend to undermine the particular factual findings. In each instance, however, the conflict in testimony resolves to a question of evaluating the credibility of the witnesses. The ALJ is in the best position to evaluate which witness is recalling the facts most accurately, and the Court cannot conduct a de novo review of the testimony to make different credibility determinations. NLRB v. Adams Delivery Service, Inc., 623 F.2d at 99.

2. Intimidation

The Company argues that the Board's findings should be overturned because there was no evidence that the interrogations actually had a coercive effect on the employees. Indeed, in two instances the interrogators indicated that the employees did not have to answer the questions.[7] Thus, it argues, the interrogations did not affect the outcome of the election and should not be considered unfair labor practices.

The short answer to this argument is that interrogation violates the Act if it has a tendency to intimidate employees in the exercise of their protected rights, even if there is no evidence of actual intimidation. See Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1080 (9th Cir.

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[7] See note 6 supra.

1977); NLRB v. Bell Manufacturing Division, Di Giorgio Leisure Products, Inc., 483 F.2d 150, 151-53 (9th Cir. 1973). As this Court explained in Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 364 v. NLRB, 435 F.2d 668, 669 (9th Cir. 1970),

> [i]n order for an employer's interrogation of employees to constitute unfair labor practices under section 8(a)(1) it must be associated with express or implied threats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activities. . . . When the inquiries are not undertaken in a threatening manner but are only isolated instances free of coercion and without any systematic intimidation in the background, they are not unlawful.

The burden rests on the General Counsel to prove that the interrogations violated the Act. See Hughes & Hatcher, Inc. v. NLRB, 393 F.2d 557, 563 (9th Cir. 1968).

In this case, the Board found that each interrogation incident was associated

with an implied threat. Moreover, it found that the interrogations were part of an overall systematic pattern of intimidation of employees. These findings are supported by substantial evidence and, therefore, justify the conclusion that the interrogations were unfair labor practices even though there was no evidence that employees were actually intimidated by the interrogations.

3. The "Critical Period" Doctrine

Finally, the Company argues that under the Board's "critical period" doctrine, interrogations occurring before the filing of the election petition should not be considered in determining if the results of the election should be set aside and the Company ordered to bargain. It relies upon Ideal Electric and Manufacturing Co., 134 N.L.R.B. 1275, 1278 (1961), wherein the Board

> concludes, in all the circumstances, that the date of filing of the petition . . . should be the cutoff time in considering alleged objectionable conduct in contested cases. From that time, when the Board's processes have been invoked and a prompt election may be anticipated pursuant to present procedures, we believe that conduct thereafter which tends to prevent a free election should appropriately be considered as a postelection objection.

To the extent that the Company is arguing that the "critical period" doctrine is a variety of statute of limitations imposed by the Board on unfair labor practices, it is clearly wrong. The only statute of limitations upon unfair labor practice charges is that found in Section 10(b) of the Act, 29 U.S.C. § 160(b), which provides that the Board cannot issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made . . . ." See Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960). As long as this requirement is satisfied, the Board is free to find that unfair labor practices have been committed regardless of the date of the filing of an election petition. Indeed, an employer can commit an unfair labor practice in some instances even if there is never an election petition filed.

To the extent that the Company is arguing that the "critical period" doctrine prevents these "pre-filing" interrogations from being considered in issuing a bargaining order, it is also incorrect. It is not clear whether the Board considers the "critical period" doctrine expressed in Ideal Electric to be a rule of evidence or a rule of substantive law. See Catholic Medical Center of Brooklyn and Queens, Inc.

v. NLRB, 589 F.2d 1166, 1170-74 (2d Cir. 1978). This Court, however, has considered the Ideal Electric "critical period" doctrine and found that it

> is simply an evidentiary device calculated to render irrelevant upon a post election contest, conduct "too remote" to have interfered with the employees' exercise of the free choice guaranteed by Sec. 7 of the Act.

NLRB v. R. Dakin & Co., 477 F.2d 492, 494 (9th Cir. 1973). The Court concluded that we were

> not prepared to give our approval to a rule which flatly bars the consideration of all pre-petition misconduct, particularly where, as here, the Regional Director concluded, and the Board affirmed, that such alleged misconduct "raised a substantial and material issue of fact" regarding the validity of the election.

Id. Accord, NLRB v. Lawrence Typographical Union No. 570, 376 F.2d 643, 652 (10th Cir. 1967).[8] Here, the Board considered

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[8] The Board itself has not invariably followed the Ideal Electric rule when it

that the events that occurred before the petition was filed were relevant to the fairness of the election. All of the incidents found to be unfair labor practices by the Board were within a month and a half of the filing of the petition, and all arose out of the Company's concern about the organization drive that led to the petition and, ultimately, to the election. This Court cannot say, as a matter of law, that these events were too remote to have had an effect of the election outcome. Nor will the Court require the Board to enforce an inflexible per se rule to disregard incidents before the

(footnote 8 continued)

felt circumstances warranted considering pre-petition conduct. See, e.g., Baker Machine & Gear, Inc., 220 N.L.R.B. 194, 207 (1975); Servomoton of Columbus, Inc., 219 N.L.R.B. 504, 505 (1975); Willis Shaw Frozen Express, 209 N.L.R.B. 267 (1974); Weather Seals Inc., 161 N.L.R.B. 1226 (1966).

filing of the election petition. Therefore, the Company's objections based upon the "critical period" doctrine are rejected.

The Court has considered the other objections raised to the Board's finding that these interrogations constituted unfair labor practices and finds them without merit.

B. SURVELLANCE AND THREATS

Director of Circulation Jules Molenda urged Yvette Hamilton, then office manager of the circulation department, to have some employees attend a Union meeting and report back. She persuaded two employees to attend the meeting and Molenda, on his own, persuaded two others to attend as well. The Board's conclusion that this activity constituted an unfair labor practice is supported by substantial

See e.g., NLRB v. Lenkurt Electric Co., 438 F.2d 1102, 1107 (9th Cir. 1971). In both of these instances, ample evidence supports the Board's conclusion that unfair labor practices were committed.

C. THE TERMINATION OF ANN GABLER

Ann Gabler was an education reporter with the Times. During the Union election campaign she decided to return to school to become a paramedic. On several occasions in December 1976, she asked Times managers if she could continue as a part-time worker after beginning school in mid-January. On December 6, 1976, Managing Editor Andrews told her that he thought something could be worked out. On the next day, City Editor Todd indicated that he could use her on Saturdays. According to Testimony credited by the ALJ, on the same day, General Manager Tobin told her that her plan to work part-time would be "fine." Gabler

again discussed the question with Andrews in early January and received an indication that it could be worked out.

Sunday Editor Michael Doogan testified that shortly before Gabler was due to stop working full-time he asked Andrews if she could work for him on Saturday nights. Andrews replied, "We don't know where she is on this union business. She tells [Tobin] one thing and other people something else." He instructed Doogan to find out what her Union sentiments were. Thereafter Andrews told Gabler that she could not work part-time, although he indicated that there might be a position after the election. She replied that if she were still working she would vote for the Union and, according to Gabler's testimony, Andrews replied that "elections are won or lost by a single vote." Finally, the Personnel Manager testified that

the Times management had placed Gabler's name on the "undecided" list regarding her Union sentiments.

The pendency of a union representation election does not prevent management from carrying on its business in the normal fashion. A company may continue to make business decisions for good reasons, for bad reasons, or for no reasons at all, so long as the decisions are not motivated by anti-union discrimination or a desire to punish activities protected by the Act. L'Eggs Products, Inc., 619 F.2d at 1341. An employer is free to terminate[9] an employee unless anti-union animus is the moving or "but for" cause. See NLRB V.

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[9]Both parties discuss this issue as a termination question, even though Gabler voluntarily left her full-time employment with the Company. The Board's remedy for the unfair labor practice requires that the Company reinstate her in a job on a part-time basis, or the equivalent.

Adams Delivery Service, Inc., 623 F.2d at 99; Stephenson v. NLRB, 614 F.2d 1210, 1213 (9th Cir. 1980); Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977). The General Counsel bears the burden of proving that the discharge was in violation of the Act. See NLRB v. Adams Delivery Service, Inc., 623 F.2d at 99. The Board must base the finding on more than a mere circumstantial inference drawn from a general history of anti-union activities by the Company. NLRB v. Best Products Co., Inc., 618 F.2d 70, 74 (9th Cir. 1980).

In this case the ALJ credited the testimony of Gabler and Doogan and found that "the employee's position regarding the Union was a critical factor in management's decision not to honor her request for part-time employment." He found that she would have been offered the

part-time job if management had been certain that she took an anti-Union stance. Thus, the ALJ concluded and the Board agreed, that the Company impermissibly based the employment decision upon Gabler's failure to express an anti-union preference, in violation of § 8(a)(3) of the Act. This finding is supported by substantial evidence and will not be overturned.

D. GRANTING BENEFITS PRIOR TO THE ELECTION

On July 2[illegible], 1976, well before the unionization drive began, the Company formulated a new program of wage reviews, which was to take effect in September of that year. The program called for regular reviews of all employees at various intervals, depending upon the length of employment and job description. The Board did not find that this program violated the Act. However, the Board found that the

Company deviated from the plan in such a way as to grant an inordinate number of wage increases and promotions in the two days immediately preceding the election. Twenty-eight employees, or fifteen percent of the bargaining unit, received wage increases on January 18 or 19, 1977. Eleven of the wage increases were granted three or more weeks later than the time prescribed in the wage review plan timetable. The Board found that these wage increases were "saved" to have the maximum impact on the election results and that, therefore, they constituted unfair labor practices.

Granting a regularly scheduled wage increase does not become an unfair labor practice merely because a union representation election is pending. Oshman's Sporting Goods, Inc. v. NLRB, 586 F.2d 699, 705 (9th Cir. 1978); Allen v.

NLRB, 561 F.2d 976, 981 (D.C.Cir. 1977); NLRB v. Styletek, Division of Pandel-Bradford, Inc., 520 F.2d 275, 280 (1st Cir. 1975); NLRB v. Gruber's Super Market, Inc., 501 F.2d 697, 701 (7th Cir. 1974). However, § 8(a)(1) prohibits "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 84 S.Ct. 457, 460, 11 L.Ed.2d 435 (1964). Accord, NLRB v. Olympic Medical Corp., 608 F.2d 762, 764 (9th Cir. 1979). The motive of the employer is critical in determining whether the granting of a wage increase prior to an election is an unfair labor practice. An important indicator of that motive is whether there has been a change

from the status quo. See Free-Flow Packaging Corp. v. NLRB, 566 F.2d 1124, 1129 (9th Cir. 1978). Moreover, the law is well established that there is a presumption of illegal motive adhering to wage increases granted prior to an election. Id.; NLRB v. Newman-Green, Inc., 401 F.2d 1, 3 (7th Cir. 1968). As one court has observed:

> The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employee's choice.

NLRB v. Styletek, Division of Pandel-Bradford, Inc., 520 F.2d at 280.

In this case the large percentage of the bargaining unit that received wage increases, coupled with the several

weeks variation from the Company's own schedule for those increases, coupled with the extremely close proximity to the election provides ample evidence to support the Board's conclusion that the Company intended the wage increases to influence voting in the election. The company's explanation that the fact the wage increases occurred in the two days prior to the election was merely coincidental is incredible. Therefore, the Court affirms the determination of the Board that these wage increases constituted unfair labor practices.

III. THE BARGAINING ORDER

Relying on NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the board set aside the election and ordered the Company to bargain with the Union. Such an extreme remedy is authorized where an employer' conduct

during an election campaign is so disruptive as to taint any "re-run" election. In Gissel the Court identified two categories of cases in which such an order is warranted. In the first category the employer's unfair labor practices are so "outrageous" and "pervasive" that a bargaining order is almost always warranted. Id. at 613-14, 89 S.Ct. at 1939-40. In the second category the employer's conduct is less flagrant but still bad enough to tend to undermine the free election process. In this latter category the Board can issue a bargaining order if the Union demonstrates that it represented a majority of the unit employees who signed valid union authorization cards. The Court also identified a third category in which the employer's practices will not merit a bargaining order because of their minimal effect on the election process. Id. at 614-15, 89 S.Ct. at

1940. See NLRB v. Chatfield-Anderson Co., Inc., 606 F.2d 266, 268 (9th Cir. 1979) (delineating the three Gissel categories); NLRB v. Pacific Southwest Airlines, 550 F.2d 1148, 1151 (9th Cir. 1977) (same).

The Company's activities in this case were not outrageous enough to fit into the first Gissel category. Therefore, the bargaining order will be enforced only if there is sufficient evidence in the record to support the conclusion that the Union enjoyed majority status at some time prior to the election and that the employer's unfair labor practices were sufficiently pervasive and outrageous to undermine the opportunity for a fair "rerun" election.

A. THE UNION'S MAJORITY STATUS

The Board found that by November 15, 1976, the Union had obtained 97 valid authorization cards in a unit of 181 employees. As a majority would consist of

91 employees, at least seven of the authorization cards would have to be invalidated to destroy the Union's majority. The Company's primary argument is that some fourteen of the authorization cards were invalid because the employees who signed them believed that the cards only requested an election and did not authorize the Union to represent them in collective bargaining with the Company.

The Union used two different authorization card forms, one of which was "single purpose."[10] Both cards clearly and unambiguously indicate the signer's intent to be represented by the Union in collective bargaining. In Gissel the Supreme Court noted:

> employees should be bound by clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

and their findings are entitled to great weight by this Court. Moreover, even if all four cards had been excluded, the remaining cards would have been sufficient to constitute a Union majority.

Seven other employees (Kathleen Ann Bibler, Lynn Conway, Betty Mead, John Spahr, Beth McCullough, Linda Goodson and Patricia Lindsey) recall being told that the cards would be used to obtain an election but fail to recall if they were told that it was the only purpose of the cards. In the absence of direct testimony that the employees were improperly solicited, it would be impossible for this Court to overturn the Board's factual finding and substitute a finding that Union adherents had "deliberately and clearly" cancelled the card's Union authorization purpose. Therefore, the Board's finding that the

authorization cards of these seven employees were valid will not be changed.

The remaining objections of the Company, that the Union's majority status is tainted by the efforts of supervisors on the behalf of the Union, that the Board improperly refused to allow the Company to see affidavits and questionnaires given to it by employee-signers who did not testify, and that one of the unit members, Ray Tyson, should have been considered a manager and, therefore, not eligible to participate as an employee in the election, are not well founded. Therefore, we find that the Union did enjoy majority status as of November 13, 1976.

B. PERVASIVE UNFAIR LABOR PRACTICES

In Gissel the Court emphasized that the determination of when to issue a bargaining order is within the discretion of the Board. 395 U.S. at 612 n.32, 89

S.Ct. at 1939 n.32; NLRB v. Peninsula Ass'n for Retarded Children and Adults, 627 F.2d 202, 204 (9th Cir. 1980); NLRB v. Pacific Southwest Airlines, 550 F.2d at 1150-51. Although that discretion is not unbounded, the Court should enforce a bargaining order where the unfair labor practices are pervasive and severe enough to fit in either the first or second Gissel category.

In this case, the Board explained its decision to issue a bargaining order, based on the range of unfair labor practices that it had found, as follows:

> The numerous and persistent acts of unlawful interrogation by higher level management, the selective hiring policy based upon unlawful questioning of job applicants or employees seeking to arrange employment interviews for job applicants, the use of employees to engage in surveillance, and the creating of an impression among employees that management was engaging in surveillance of their union and protected activities, as well as the threats of loss of employment are collectively sufficient to warrant a determination that a fair rerun

> election could not be held. Equally pernicious . . . is management's manipulative use of the wage review program to grant pay increases to groups of employees in all departments in an effort to undermine their support for the Union and influence the outcome of the election. It is reasonable to conclude that the total cumulative effect of these unfair labor practices, coupled with the additional unlawful refusal to employ Gabler on a part-time basis, will be a lasting one, and the conditions necessary for providing a fair expression of employee sentiment in a rerun election will not be achieved by a traditional cease and desist order.

The total number, severity, and immediacy of the unfair labor practices in this case far exceeds those in NLRB v. Peninsula Ass'n for Retarded Children and Adults, 627 F.2d at 204, (where the violations were characterized as "relatively mild"), and in NLRB v. Chatfield-Anderson Co., Inc., 606 F.2d at 269, (where the most severe violations were "mitigated" and others were "almost trivial"), two recent

cases in which we refused to enforce Board bargaining orders.

The wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases - and decreases.

In addition, we are not persuaded that the harmful effect of the Company's unfair labor practices has been dissipated by the fact that two of the Company's representatives who committed some of the unfair labor practices (supervisors King and Molenda) have left its employ. Several of the unfair labor practices were committed by high level management personnel who did not, as did the management personnel in

Chatfield-Anderson Co., Inc., choose to disavow their coercive conduct before the election. Moreover, the unlawful wage increases were granted by management, not by the departed supervisors. Cf. NLRB v. Peninsula Ass'n for Retarded Children and Adults, 627 F.2d at 205 (solicitation manager "directly responsible" for violations no longer with employer). Therefore, it appears unlikely that the effect on the employees of the unfair labor practices of management has been softened by the departure of two supervisors.

The Board's finding that a fair rerun election would not be possible is, therefore, supported by substantial evidence.

The Board's entire order, including the bargaining order, is enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 79-7024
ANCHORAGE TIMES PUBLISHING CO., Respondent.	)	ORDER

Before: ANDERSON and SKOPIL, Circuit Judges, and BYRNE*, District Judge

After full consideration, the petition for rehearing of Respondent is DENIED.

*The Honorable Wm. Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by Designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	No. 79-7024
Petitioner,	)	
v.	)	NLRB # 19-CA-9170
ANCHORAGE TIMES PUBLISHING CO.,	)	19-CA-9185
Respondent.	)	19-RC-8221

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of respondent's motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before June 14, 1981.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby DENIED.

/s/_____
United States Circuit Judge
ANDERSON

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX D

237 NLRB No. 78

D-4056
Anchorage, Alaska

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ANCHORAGE TIMES PUBLISHING CO.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, AFL-CIO

Cases 19-CA-9170
19-CA-9185,
and 19-RC-8221

DECISION AND ORDER

On May 10, 1978, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief; and Respondent filed a brief in answer to cross-exceptions of General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The General Counsel has excepted to: (1) the failure of the Administrative Law Judge to consider and count the authorization cards of employees Howard Thrush, Kathleen Digel, Linda Goodson, Sue Leasure, and Patricia Wendel; (2) the Administrative Law Judge's misadding of the total number of valid authorization cards, with a corresponding motion to correct the Administrative Law Judge's error; and (3) the

(continued)

(footnote 1 continued)

selection by the Administrative Law Judge of November 14, 1976, rather than November 13, 1976, as the date upon which Respondent's obligation to bargain with the Union arose. We find merit in each of these exceptions.

As to the first exception, the record reveals that employees Thrush, Digel, Goodson, Leasure, and Wendel signed authorization cards by November 13, 1976, that they read the card before signing it, and that none of them were told that the sole purpose of the card was to obtain an election. Thus, these five cards should be counted as valid authorization cards.

As to the second exception, the Administrative Law Judge in part IV of his Decision listed the names of 95 employees who had signed valid authorization cards as of November 14, 1976, but he inadvertently stated in the conclusion to part IV that the total number of valid authorization cards as of November 14, 1976, was 94. Therefore, we grant the General Counsel's motion to correct the error.

As to the third exception, the Administrative Law Judge found that as of November 13, 1976, 92 valid authorization cards had been signed, but that Respondent's obligation to bargain with the Union arose on November 14, 1976, when 95 valid cards had been signed. However, since the 92 valid cards as of November 13, 1976, constituted a majority of the 181 employees in the unit on that date, the Administrative Law Judge erred in selecting November 14, 1976, as the date upon which Respondent's obligation to bargain with the Union arose. In addition, since we now find 5

2. Substitute the attached notice for that of the Administrative Law Judge. Dated, Washington, D.C. August 15, 1978.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing at which all parties had an opportunity to present evidence, that we committed certain unfair labor practices in violation of the National Labor Relations Act, as amended, we hereby notify you that:

The National Labor Relations Act gives you, as employees, certain rights, including the rights:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all these things

Accordingly, we give you these assurances:

WE WILL NOT question our employees concerning their union activites or sentiments.

WE WILL NOT threaten employees with loss of jobs, if a union becomes their bargaining representative.

WE WILL NOT cause employees to engage in surveillance of union meetings or union activities of other employees.

WE WILL NOT create an impression that employees' activities on behalf of the Union in attending a Board representation hearing are under surveillance by management officials, and WE WILL NOT threaten employees with a "black mark" or any other reprisal because of their attendance at a Board representation hearing.

WE WILL NOT question job applicants about their union sympathies or desires.

WE WILL NOT engage in a selective hiring practice based on prospective employees' union sympathies, or lack thereof.

WE WILL NOT grant wage increases so as to influence the results of a secret ballot election by undermining the employees' support for the Union.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Local 1547, AFL-CIO, or any other labor organizations, by terminating employees and refusing to offer them part-time employment, or in any other manner discriminate against employees because they are suspected of having engaged in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights

guaranteed them by Section 7 of the Act.

WE WILL offer Ann Gabler immediate and full reinstatement to a position in the newsroom, on a part-time basis or, if such a position no longer exists, to a substantially equivalent position on a part-time basis, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered because of our discrimination against her.

WE WILL recognize, effective November 13, 1976, and, upon request, bargain collectively with International Brotherhood of Electrical Workers, Local 1547, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate collective-bargaining unit set fourth below, and embody any understanding

reached in a signed agreement. The appropriate collective-bargaining unit is:

> ALL employees employed in the Respondent's circulation, advertising, editorial, and accounting departments, excluding manager of employees, inserters, stringers, confidential employees, guards and supervisors as defined in the Act, and all other employees who are represented in existing collective-bargaining units by either Anchorage Typographical Union No. 823, ARL-CIO, or International Printing Pressmen and Graphic Communications Union of North America, Local 327, AFL-CIO.

ANCHORAGE TIMES PUBLISHING CO.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or

covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Federal Building, Room 2948, Seattle, Washington 98174, Telephone 206-442-7472.

JD-(SF)-110-78
Anchorage, Alaska

ANCHORAGE TIMES PUBLISHING CO.
and
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1547,
AFL-CIO

Case Nos. 19-CA-9170
19-CA-9185
19-RC-8221

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APPENDIX

JD-(SF)-110-78
Anchorage, Alaska

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

ANCHORAGE TIMES PUBLISHING CO.
and
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1547,
AFL-CIO

Case Nos. 19-CA-9170
19-CA-9185
19-RC-8221

Clifford H. Anderson, Max D. Hochanadel, and Richard J. Omata, Esqs., Seattle, Wash., for the General Counsel.
William K. Germain, Esq., Anchorage, Alaska, for the Charging Party.
Karl Johnstone, Esq., Anchorage, Alaska, for the Respondent.

DECISION

Statement of the Case

GORDON J. MYATT, Administrative Law Judge: Upon charges filed in Case Nos. 19-CA-9170 and 19-CA-9185[1] by International Brotherhood of Electrical Workers,

[1] The charges in Case Nos. 19-CA-9170 and 19-CA-9185 were filed on January 17 and 24, 1977, respectively.

Local 1547, AFL-CIO (hereinafter called the Union), the Regional Director for Region 19 issued an order consolidating both cases and a Consolidated Complaint and Notice of Hearing on March 31, 1977, against Anchorage Times Publishing Co. (hereinafter called the Respondent). The consolidated complaint alleges that the Respondent has engaged in conduct which violates Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (hereinafter called the Act), 29 U.S.C. 151 et seq. More specifically, the consolidated complaint alleges that: (1) on various occasions, commencing in mid-October 1976,[2] the Respondent through its supervisors and agents interrogated employees about their union activities and sentiments and about the union activities and

---

[2] Unless otherwise indicated, all dates herein refer to the year 1976.

unfair labor practices. At the hearing Respondent also entered a denial of the amended allegations asserted by the General Counsel.

With regard to Case No. 19-RC-8221, a petition was filed on November 16, 1976. The Regional Director issued a Decision and Direction of Election on January 5, 1977, and a secret ballot election was conducted on January 20, 1977, among the employees in the following unit found appropriate:

> All employees employed by the Employer [Respondent] in the circulation, advertising, editorial, and accounting departments, excluding managerial employees, inserters, stringers, confidential employees, guards and supervisors as defined in the Act, and all other employees who are represented in existing collective-bargaining units by either Anchorage Typographical Union No. 823, AFL-CIO or International Printing Pressmen and Graphic Communication Union of North America, Local 327, AFL-CIO.

Following the balloting, a tally of ballots established that of approximately 184 eligible voters, 73 cast ballots for

the Union and 77 against, with 16 ballots challenged. On January 24, 1977, the Union filed timely objections, and on April 5, 1977, the Regional Director issued a Supplemental Decision and Order on the challenged ballots. The Regional Director overruled 12 challenges, sustained 1 and left 3 undetermined. Thereafter the challenged ballots were counted and a revised tally of ballots issued showing 74 employees cast ballots in favor of representation by the Union and 88 against. On May 25, 1977, the Regional Director issued a Second Supplemental Decision and Order in which he ruled on the objections filed by the Union. The Regional Director found that various objections were without merit and dismissed them. He further found, however, that Objection Nos. 1, 2, 3 (except for conduct alleged to have occurred prior to the date of the filing of the

representation petition) and 4 were substantially similar or related to allegations contained in the consolidated complaint. He determined that these objections could best be resolved by record testimony taken during the hearing on the complaint. He ordered the unresolved objections consolidated with the unfair labor practice cases.

The Union filed a request for review of the Regional Director's Decision and Order. By a telegram dated July 18, 1977, the Board overruled, in part, the Regional Director's Decision by expanding the hearing on the objections to include evidence on whether the Employer conducted campaign meetings among the employees within the 24-hour period preceding the election.

A hearing was held on this matter on various dates commencing July 19 and ending July 26, 1977, in Anchorage, Alaska. All

parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and present material and relevant evidence on the issues involved. Briefs were submitted by all counsel and have been duly considered.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor while testifying, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, Anchorage Times Publishing Company, is, and has been at all times material herein, an Alaska corporation engaged in the business of newspaper publication. Its principal office and place of business is located in Anchorage, Alaska. During the past 12 months, in the course and conduct of its business operation, Respondent held membership in or subscribed to interstate news services,

published nationally syndicated features, and advertised nationally-sold products. During the course of its business operations in the period set forth above, the Respondent received gross revenues in excess of $200,000.

The pleadings admit, and I find, that at all times material herein the Respondent was and is an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union, International Brotherhood of Electrical Workers, Local 1547, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background Facts

The record discloses that during the late summer of 1976, a group of the Respondent's employees from the editorial department (newsroom) were actively seeking a union willing to represent the employees in the accounting, advertising, circulation, and editorial departments. The International Typographical Union (ITU) and the Printing Pressmen and Graphic Communication Union (Pressmen) were currently representing units of employees in the composing and press rooms. There is testimony indicating that the Newspaper Guild felt it would be too expensive to come to Alaska to undertake the effort and the ITU was unable to mount a successful organizing campaign for these employees. As a result, employees Mary "Kay" Brown, William "Pat" Dougherty, and William Wilson decided to explore the possibility of interesting the Charging

Party Union (IBEW) in undertaking the organizational effort. They met with William Coleman, an IBEW business representative, on October 15 at the Union's office to discuss the feasibility of having an electrical craft union represent newspaper employees. It was decided that Coleman should meet with a larger group of the employees to explain the advantages of being represented by the IBEW. It is the subsequent events which occurred during the basis for the allegations of unlawful conduct and the objections to the election.

B. The Union's Efforts to Organize the Employees

On October 24, a larger group of employees met with Coleman at the Union's office. During the course of this meeting, Coleman explained how representation by the Union would benefit the employees. He told the employees that if 30 percent of the

employees in the unit signed cards authorizing the Union to represent them, a petition could be filed with the National Labor Relations Board for an election. He further told them that if 51 percent of the employees signed authorization cards, the Union could request recognition and the Respondent could voluntarily recognize the Union as the collective-bargaining representative of the employees. He anticipated, however, that the Respondent would refuse to do this and the employees should be prepared to go to an election. Coleman explained the benefits the employees would receive if the Union negotiated on their behalf. He took out a sample authorization card and read it to the employees, explaining that it meant they were authorizing the Union to represent them. He instructed employees who intended to solicit signatures from coworkers not to add to or change any information placed on the cards.

Authorization cards were signed by some of the employees at the meeting, and a number of blank authorization cards were passed out for distribution to employees not in attendance. The authorization cards distributed by Coleman contained the following heading:

> AUTHORIZATION FOR REPRESENTATION
>
> I authorize the International Brotherhood of Electrical Workers to represent me in collective bargaining with my employer.

Coleman met with additional groups of employees on October 27 (at the Club 25), November 3 (at the Keyboard Lounge) and November 5 (at the Captain Cook Hotel). At each meeting he explained the advantages the employees would gain by being represented by the Union. He repeated that the authorization cards would allow the Union to represent the employees, and that if 51 percent signed, the Union could request voluntary recognition from the Respondent.

He stated, as in the prior meeting, that he did not anticipate the Employer would grant voluntary recognition. Therefore, the Union would petition for an election conducted by the Board. He also told the employees that although only 30 percent needed to sign cards in order to have an election, the Union was seeking to get as many signed cards as possible. At each of these meetings Coleman responded to questions asked by the attending employees. Cards were passed out on each occasion, and a number of employees signed and returned them at the conclusion of the meeting. Other employees retained cards, some of which were signed and turned in later. A number of employees took blank cards in order to solicit signatures from their coworkers.

In addition to giving out authorization cards at the meetings, Coleman mailed solicitations to the employees. Attached

to the mailed solicitations were Xerox copies of an authorization card which the recipient was urged to fill out, sign, and mail to the union organizing committee. These Xerox copies were different in wording from the cards handed out at the various meetings. The Xerox version contained the following heading and explanation of purpose:

> I REQUEST A GOVERNMENT ELECTION
>
> I, the undersigned, of my own free will, hereby authorize and designate the National Brotherhood of Electrical Workers of the AFL-CIO and CLC to represent me in collective bargaining with my employer in all matters pertaining to rates of pay, hours of employment, and other conditions of employment. This card is also for the purpose of requesting the N.L.R.B. for an election.[3]

As a result of the organizational effort, a petition for a representation election was filed by the Union on November 15, in Case No. 19-RC-8221. A hearing was

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[3]Respondent's Exhibit No. 2.

held on December 13, and pursuant to a Decision and Direction of Election issued January 5, 1977, a secret ballot election was conducted on January 20, 1977.

C. The Change in the Wage Review Program

Although the testimony concerning management's modification of its wage review policy for the employees is conflicting in many respects, it is apparent that a top level management decision was made in July 1976 to revise the existing wage review policy. The unrefuted testimony establishes that Robert Atwood, Respondent's owner and publisher, sought assistance and technical advice in 1975 from an employer who operated a newspaper chain in the Lower States. At the time the Respondent was experiencing severe internal problems due to a high rate of turnover among its employees. This consultation led the Respondent to develop a pay plan in which positions were classified by levels,

Respondent was installing new electronic equipment which would result in the phasing out of some job positions in the pressroom.

A subsequent meeting was held on September 22. This meeting was called at the request of Ed Hein, a reporter, to enable the newsroom employees to present management with complaints about the inadequacy of their salaries. John "Mike" Kennedy, sports editor and an acknowledged supervisor, prepared a report on behalf of the employees with the assistance of Brown for presentation to management. This report set forth the employees' arguments for higher wages. It also included an unfavorable comparison between the wages paid by the Respondent and the wages paid by other newspapers and the wire services for similar positions in the Lower States.

Tobin was the chief management representative at this meeting.[5]

During the course of the meeting, Ann Gabler, a reporter assigned to cover education news, expressed the view that the Respondent's reporters were earning less for 12 months' work than teachers who were paid on a 9-month basis. Tobin then informed the employees of the various levels of job classifications recently established by the Respondent and the job categories within the job levels. He refused, however, to divulge the wage scales assigned to the job levels.

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[5] Martha Lloyd, personnel director, attended this meeting and took notes for management. She testified that this was the final meeting between management and the newsroom employees on the subject of salaries. Although there is conflicting testimony regarding whether a subsequent meeting was held, Lloyd's notes (Respondent's Exhibit No. 10) corroborate the testimony of the employees concerning the substance of the meeting on this date.

In early October, shortly before the third and final meeting between the newsroom employees and management, Brown went in to see Tobin regarding management's failure to reveal the wage scales assigned to the various job levels. According to Brown, Tobin wated to know what kind of conspiracy the newsroom employees were plotting. Tobin advised Brown that the Respondent did not expect the employees to stay with the newspaper forever, and if she were not satisfied she should go elsewhere. While Tobin acknowledged that he did ask Brown what was going on among other newsroom employees, he stated that he informed Brown if the employees had a union movement going on, it would not be proper for him to talk to her.

The third meeting between management and the newsroom employees took place in

early October.[6] At this meeting Tobin again refused to reveal the wage scales assigned to the various job levels. The employees were angered by this, and Gabler commented that management would not accept a story from any of the reporters if it were incomplete, therefore, she considered his report unacceptable.

D. The Conduct of Managing Editor Andrews

1. Interrogation of Brown:

Employee Brown testified that she was called into Andrews' office on October 29. Andrews told the employee he knew she was one of the chief employee organizers for the Union. He asked Brown what the specific complaints of the employees were,

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[6] Although Lloyd testified that the September 22 meeting was the final one between management and the newsroom employees, both Brown and Gabler testified that there was a subsequent meeting in early October. I credit their testimony in this regard, and find that there was indeed a third meeting.

in order to determine if he couldn't do something about them. According to Brown, he accused her of being evasive during the course of the discussion. When she stated that he did not have the right to question her in this regard, Andrews replied that he had the right but could not force her to answer. Brown told Andrews that money was one of the issues and another issue was the concern about the quality of the work product. Andrews replied that he failed to see how the Union could improve the quality of the work. He told Brown that she was considered one of the "bright employees," and that only a weak individual seeking recognition needed the Union. He stated that he didn't consider Brown to be this type of person.[7]

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[7] Andrews admitted the substance of this conversation in all material respects.

Shortly thereafter, the union organizing committee drafted a note to Andrews warning him that his questioning of employees was unlawful (Respondent's Exhibit No. 25). This note was delivered to Andrews through the interoffice mail system.

2. Interrogation of Frank Gerjevic:

Gerjevic was a reporter on the copy desk. He testified that in early November he was called into Andrews' office. He was informed that he was being given a raise. According to Gerjevic Andrews stated that the Respondent appreciated his work because he was quiet and didn't want to vote. Andrews asked the employee if he had been pressured by the Union? Gerjevic acknowledged that he had been approached, but not pressured.

Andrews admitted having the conversation with Gerjevic in early November. He testified that the pay increase was the

result of the employee's regular wage review. He also admitted asking if the Union were pressuring the employee, and stated that Gerjevic "volunteered" information about the organizing campaign in the newsroom. It is evident from Andrews' admissions that the testimony of Gerjevic is an accurate account of this conversation.

3. Conversations with Susan Pollock:

Pollock was initially hired as a switchboard operator and receptionist in May. During the first week in September, the employee was transferred to the position of newsroom secretary and Andrews became her supervisor. The testimony of this employee indicates that she went to Andrews in November to inquire about a pay raise. According to Pollock, Andrews promised to bring up the matter at the next management staff meeting. Several weeks later Pollock approached Andrews again to

inquire about the pay raise and requested a change in position to newsroom staff writer. Pollock testified that Andrews stated the Respondent was not hiring anyone because of the union movement, and had to be careful that the "wrong person" was not hired. The employee asked when the union matter would be settled, and Andrews replied there would be an election in February. Pollock then inquired about a transfer after the election, and Andrews stated he did not think it would be possible.

Andrews testified that Pollock came to him asking for a raise because she had been given increased responsibility and was not making enough on which to live. He acknowledges that he "might have" told the employee there was a hiring freeze. He denies he stated, however, that the Respondent had to be careful about hiring the wrong person. According to Andrews, he

later determined that Pollock was doing extra work. Because of this, he recommended a pay increase on the basis of a change in her job duties. The pay increase was subsequently approved by the personnel director and made retroactive to the time that she started performing the extra work.

4. Conversations with John Matthews:

Matthews was assigned to cover the courts for the Respondent. He testified that approximately a week after October 24 (the date he signed the union card) he was in Andrews' office and the subject of the Union came up. Matthews did not indicte who brought the subject up or in what context it arose. He testified that he had a blank authorization card in his pocket and he showed it to Andrews, who stated that he had seen them. On cross-examination, Matthews denied asking Andrews what he should do with the card. Sometime in

late November or early December, Matthews was again in Andrews' office. According to Matthews, Andrews stated, "[N]ow this may or may not be legal for me to ask you this, but have you made up your mind about this union thing yet?" Matthews testified that he hedged and responded that he wanted to do whatever was best for the Company.

Andrews, on the other hand, testified that Matthews came into his office in early November and volunteered that a number of people were talking to him to persuade him to sign a card for the Union. He then placed a blank card on Andrews' desk. Andrews told the employee that only weak people try to organize a union. He testified that he told Matthews that personally he (Andrews) didn't need a union to bargain for him. According to Andrews, the employee thanked him for this advice. Andrews admitted that in a later conversation with Matthews he asked the employee

what he had decisded to do about the union authorization card. He acknowledged the employee did not tell him.

Considering the testimony of both of these witnesses, especially in view of Matthews' failure to recall the circumstances of the first conversation as well as Andrews' candid admissions, I find that Matthews did initiate the first conversation and volunteer information about the card. I also find, however, that Andrews was aware his questioning was unlawful during the second conversation, and so advised the employee.

5. The wage review of Carl Sampson:

The first week in February 1977, shortly after the representation election, Sampson approached Andrews about his 6-month wage review. Andrews advised the employee that the Respondent would have to hold off because charges had been filed after the representation election. Andrews

was concerned that the Respondent not commit any unfair labor practices, and told Sampson that he would check to see if it were unlawful to give him a wage increase. He assured the employee that when the increase was granted, it would be made retroactive to his 6-month anniversary date. Upon checking, Andrews was advised that the wage increase would be lawful and Sampson received a pay raise 2 weeks later.

E. The Conduct of City Editor Todd

1. Polling employee union sentiment:

William Wilson, a reporter whose primary assignment was covering labor news, was approached by Todd in the newsroom sometime in late November. Todd informed Wilson that he was conducting a poll of his own, and asked Wilson how he would vote in a representation election? Wilson indicated that he was not certain. Sarah Wilson, wife of William Wilson, was also a

reporter for the Respondent. She testified that Todd approached her in the newsroom approximately a week after the representation petition was filed (November 15). She stated that Todd asked her what her "leanings" were with regard to the Union. Sarah Wilson replied that she had no comment to make.[8]

2. Warnings regarding employee attendance at the representation hearing:

Both William and Sarah Wilson testified that on December 13, they were in the alley behind the Respondent's building preparing to go to the afternoon session of the representation hearing on the Union's petition. Todd approached them and inquired if they were going to the proceedings. William Wilson testified that Todd stated he did not think it was a good idea because "the people upstairs are watching."

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[8] Although Todd was called as a witness, he did not testify regarding the above conversation with William and Sarah Wilson.

Wilson asked if they would get a "black mark" if they attended, and Todd replied yes. According to Wilson, Todd stated he had talked to "the people upstairs" about Wilson attending the hearing, since his job was covering labor news. Todd said it was up to the employee to attend, but was skeptical about the wisdom of Sarah Wilson also attending. Sarah Wilson, recalling this same incident, stated that Todd told them "the people upstairs are watching," and "they" have discussed the matter of her husband attending and decided that it was all right. However, Todd indicated that she should not attend.

Todd admitted discussing the matter of the attendance of the representation hearing with the Wilsons. According to Todd, he advised Sarah Wilson not to attend because the hearings were not within her work responsibilities. He cautioned her that she would be well advised to do her

own work. Todd did not recall whether he informed Wilson that management was watching to see who attended, or that it would be a black mark against an employee who chose to attend.

On the basis of the above, I find that Todd did in fact indicate to the Wilsons that higher level management was watching to see which employees attended the representation hearings. Further, he indicated that it would be a black mark against any employee who attended that management felt should not be there. I base this finding not only on Todd's failure to recall whether he made this statement, but also on the fact that Todd impressed me as being very guarded and circumspect in his testimony. Accordingly, I credit the version given by the Wilsons regarding this particular incident.

3. Interrogation of employee Sampson:

The unrefuted testimony indicates that on November 2, Todd asked Sampson how he felt about "this union thing?" He told Sampson he need not answer if he didn't wish to. He also asked the employee if he had signed a union authorization card. During the conversation, Todd wanted to know if there was anything (among the employees' complaints) that management could address itself to, other than the money issue. Sampson subsequently presented Todd with a memorandum on the matter, which Todd presented to Andrews. Todd later told the employee that is was a "good memo."

F. The Conduct of Molenda, Director of the Circulation Department

1. Inducing employees to attend a union meeting:

Yvette Hamilton, office manager of the circulation department until her discharge

on December 17,[9] testified that she was told by several employees in October that a union organizing meeting was going to take place after work. Hamilton, an admitted supervisor, was given permission by these employees to inform Molenda, her superior, provided their names were not revealed. The testimony of both Hamilton and Molenda indicate that when she informed him of the meeting, he urged her to get some employees to attend and report back in order to "see what was going on." Hamilton succeeded in getting two employees to attend the organizing meeting and report back to her. Unknown to Hamilton, Molenda also persuaded two other employees from the circulation

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[9] Hamilton was discharged by the Respondent on December 17 on Molenda's recommendation. The testimony indicates that when Molenda became the director of the circulation department in June 1976, a personality clash developed between Hamilton and him which eventually resulted in her discharge.

department to attend the meeting and make their reports directly to him. Molenda testified that he reported the information gained through the employees to higher level management.

Molenda also urged Hamilton to socialize with the employees in the evenings after work and speak against unionization. Molenda testified that he was aware Hamilton frequently met with circulation department employees after office hours, and he sought to use this relationship to counter the organizational drive in his department. In addition to socializing with the employees, Molenda instructed Hamilton to compile a list setting forth which of the circulation department employees were for or against the Union. Molenda told Hamilton that Lloyd would question job applicants to determine their union sentiments.

2. Group meetings with circulation department employees:

Hamilton testified that prior to her discharge, Molenda held several meetings with the employees in the circulation department. These meetings were for the purpose of arguing against the wisdom of selecting the Union as the collective-bargaining representative. Although Hamilton could not place precise dates on the meetings, she stated that Molenda told the employees that if the Union became their representative, they would not have a "progressive system of advancement," and would have to stay on one job. Hamilton recalled that Molenda also told the employees the Union would price them out of a job, and it would be cheaper for the Respondent to use computers to do their work.

Molenda admitted holding meetings with the employees in his department. He

testified that he recounted his prior experience with a union on a job he held at a newspaper in Buffalo. According to Molenda, he explained why he found the situation unsatisfactory and left to go to another newspaper in another city. He also admitted stating that the composing room employees, represented by other labor organizations, lost some jobs and their functions were replaced by the installation of electronic machinery. He attributed this to the fact that the employees had been unionized and priced themselves out of the market.

Employee Ridenour, a billing clerk in the circulation department, testified on direct examination that Molenda held a meeting of the circulation department employees on the morning of the election

(January 20, 1977).[10] According to her testimony, Molenda stated that he was not supposed to have a meeting with the employees before the voting, but he wanted to urge them to "stick with the Company." He stated that if the employees had any problems, they should bring them to him and they could be worked out. On cross-examination, Ridenour conceded that her memory could have been faulty as to the date, and that the meeting may have been held the day before the election.

Both Molenda and his secretary, Beverly Gearhart, testified concerning this meeting. Molenda admitted having a meeting with the employees and urging them to be loyal to the Respondent. Molenda stated the meeting took place on January 19, 1977--the day <u>before</u> the election. He

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[10] Although it is not clear in the record, it appears that the election commenced at 10 a.m. on January 20.

testified that the meeting commenced at 9 a.m. and lasted for approximately 15 minutes. Molenda was unable to recall whether he told the employees to bring their problems to him. Gearhart, who was assigned the task of rounding up the employees, corroborated Molenda's testimony as to the date, hour and length of the meeting.

In view of the imprecise recollection of Ridenour, I credit the testimony of Molenda and Gearhart as to the time of the meeting. I find, therefore, that the meeting was held on January 19, 1977, and not on the day of the election as suggested by Ridenour. I also find that the meeting started at 9 a.m. and lasted for approximately 15 minutes. I do find, however, that during the course of this meeting Molenda told the employees to bring their problems to him and they could be worked out. My finding in this regard is based on

the fact that Molenda demonstrated excellent recall on all aspects of his conversations with the employees except on this critical point. In my opinion, his failure to recall this point was deliberate, and I credit the testimony of Ridenour concerning his statement.

3. The interrogation of the group leaders:

The record discloses that after the discharge of Hamilton on December 17, Molenda decided to divide her duties among three employees. He selected Elaine Kraft, Elaine Moore and Betty Broste, and classified these employees as group leaders. He had a conference with the three employees the latter part of December, and informed them that they were going to handle the work previously performed by Hamilton. Molenda made it clear to the employees they would be performing the new duties on a trial basis to see how they worked out

before their promotions became official.[11] Kraft testified that during the course of the conversation, Molenda asked the employees if they were prounion? According to Kraft, Molenda stated they need not answer if they did not want to. Kraft asked Molenda about the Respondent's revised policy on the 3-month, 6-month and yearly wage reviews. According to the testimony of Kraft and Moore, Molenda stated he was uncertain about the policy and would check the matter out with Lloyd.

Although Molenda denied asking the three employees whether they were for or against the Union, I do not credit him in this regard. Kraft's testimony was forthright, and the statement she attributed to Molenda was consistent with his prior

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[11] It should be noted that each of these employees voted in the election without challenge.

pattern of conduct in attempting to ferret out information concerning the organizing effort among the employees.

G. Threats of Loss of Employment

Shawn Bonney, a former employee, was hired in October 1976 to work in the mailroom. His supervisor was Larry King. Although the Respondent contested King's supervisory status, I find on the basis of the testimony of employees Bonney and Sloan, as well as that of management officials Lloyd and Molenda, that King was a first-line supervisor in the mailroom on the night shift.[12] Bonney testified

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[12] Bonney and Sloan testified that King assigned drivers to their routes and work to the mailroom employees. He was responsible for seeing that these employees carried out their job assignments, and, according to Bonney, often threatened them with discharge in the event they failed to perform their duties properly. Both Lloyd and Molenda acknowledged that King was the night supervisor of the mailroom. King was discharged by Molenda in early January 1977.

that in December 1976, he had numerous conversations with King and employee Aikenhead in the mailroom concerning the prospects for mailroom employees in the event the Union was certified as the collective-bargaining representative. Bonney testified that King told the employees the drivers would be laid off and most routes would be contracted out. He also stated that one of the employees in the mailroom (Aikenhead or Bonney) would be laid off because Respondent would not be able to afford to keep both of them. Bonney's testimony in this regard is unrefuted.

H. The Transfer of Hein to the Juneau Office

In early November, management decided it would establish a full-time office in Juneau to cover the southeastern portion of the state as well as the state legislature. Prior to this, reporters were sent to the

area on assignment when the legislature was in session. The foremost candidates for the position for the Juneau bureau chief[13] were reporters Ed Hein and Carl Sampson. According to the testimony of Sampson, he spoke with Managing Editor Andrews on November 12 about the assignment to the Juneau office. He was informed that no decision had been made by management. Later that day, however, Hein was informed that he was to get the position and to make arrangements to leave as soon as possible. Sampson testified that approximately 2 weeks later, he was driving City Editor Todd home from work and asked how Hein was making out at the Juneau office. Todd indicated that Hein was doing all right and told Sampson that Hein was selected for the

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[13] The tile of bureau chief is a misnomer. The office was to be staffed by only one person, directly responsible to the newsroom editors in Anchorage.

position because Atwood (the publisher) wanted him out of town. According to Sampson, Todd stated that management felt Hein wanted to be the shop steward for the Union when it became the collective-bargaining representative at the Times.

Both Todd and Andrews testified that Hein was selected for the Juneau position because he was hired as a political reporter. They stated that Sampson was a general assignment reporter who only covered political matters about 15 percent of the time. They indicated that management's decision was based solely on Hein's prior experience in reporting on political matters and because he had cultivated contacts during his past coverage of political campaigns. Todd did not refute, however, the statements attributed to him regarding Atwood's desire to get Hein out of Anchorage.

Because of this critical omission, I credit the testimony of Sampson. While it is evident that Hein was qualified by experience for the position in Juneau, it is equally evident, on the basis of Sampson's credited testimony, that Hein's active role in the organizing effort was also a factor considered by management in making the assignment.

I. The Failure to Employ Mark Godwin as a Sportswriter

Godwin had been a former employee on the newsroom staff. He left his job in August 1976 to enter law school. After several months, Godwin decided he didn't want to continue in law school and returned to Anchorage. He was a close friend of Kennedy, the sports editor. Kennedy told Godwin that he needed another sportswriter and suggested that he talk to Andrews about

the job. According to Godwin's affidavit,[14] he went to see Andrews during the middle of November. The affidavit indicates that when Godwin applied for a job as a sportswriter, Andrews stated there was a hiring freeze. Godwin could not recall if Andrews specifically stated that the freeze was due to the union organizing activity or whether is was "implied" during the course of the conversation. During his conversation with Andrews, Godwin volunteered that if he were hired and found to be in the bargaining unit, he would not vote in the coming election. His affidavit

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[14] At the time of the hearing, Godwin was no longer employed by the Respondent and was attending the FAA air traffic controllers school in Arizona. The parties agreed to submit his affidavit in the record in lieu of his testimony.

indicates that Andrews made no response to this statement.[15]

According to the affidavit, Godwin visited Tobin the early part of December to press his application for a job as a sportswriter. Godwin asked Tobin when the hiring freeze would end. His statement indicates that Tobin gave him no definitive answer, and stated that there were a lot of things going on, including "the union thing." Godwin made several visits to Andrews' office during the month of December to inquire about the job. He was finally hired by the Respondent sometime during the middle of January 1977 as an ad service clerk.

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[15] Godwin's affidavit indicates that he made this statement to Andrews at the suggestion of Kennedy, who advised him to indicate to management that he was not a union adherent in order to increase his chances of getting the job.

Kennedy's testimony indicates that he suggested Godwin apply for a job as a sportswriter because he (Kennedy) felt he needed extra help. He also suggested that Godwin give the appearance of being neutral regarding the Union in order to persuade management to hire him. After Godwin spoke with Andrews, Kennedy went in to see how he made out at the interview. According to Kennedy, Andrews stated that Godwin professed to be neutral regarding the Union, but "things might have been different if he had said he was against the Union." Kennedy further testified that in early December, Andrews informed him there would be no addition to the sports staff. Andrews said, according to Kennedy, not to be "surprised to see some new faces around here," and it was "very calculated to a point." Kennedy also attempted to follow through on Godwin's application with Tobin. He stated that he had heard that Godwin's

interview with Tobin did not go well, and he wanted to attempt to smooth the matter out. According to Kennedy, Tobin stated he wasn't going to "hire anyone who was going to go against us." Kennedy admitted that this was not said in specific reference to the Godwin application.

Mike Doogan, the Sunday editor, was also a friend of Godwin.[16] He spoke with Andrews sometime prior to the election in January concerning the status of Godwin's request for a job. Doogan testified that Andrews stated Godwin's interview with Tobin went badly, as he appeared to be hostile. Andrews added that Godwin hadn't always worked as hard as he might when he was previously employed by Respondent. According to Doogan, Andrews indicated that

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[16] At the time of the hearing, Doogan, who had been employed by the Respondent for 5-1/2 years, had given notice of intention to quit.

Godwin said he would not vote in the pending election. Doogan testified that Andrews then stated, "They have to volunteer, the Company can't tell them anything."

Both Tobin and Andrews testified concerning their conversations with Godwin, Kennedy, and Doogan. Tobin stated he informed Kennedy that the sports staff would not be increased.[17] He also reported that Godwin was intemperate and abusive during the interview. Andrews acknowledged that both Kennedy and Doogan came to see him on different occasions regarding Godwin's application for employment. He denies mentioning to either of them that Godwin stated if he were hired,

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[17] The record indicates that the Respondent had no plans for increasing the size of the sports staff at the time of Godwin's application. In fact, it had not been increased from its original size in 1976 through the date of the hearing herein.

he would not vote. Andrews further testified that he told Kennedy he had not been satisfied with Godwin's work when he was previously employed, and that he was not going to make any additions to the sports staff. Andrews denied telling Kennedy that there would be "new faces" in the newsroom and that it was "very calculated."

Although Kennedy and Doogan were supervisory employees, it is evident from their testimony, on direct as well as cross-examination, that they supported the union movement among the employees. This is especially true in the case of Kennedy, who attended meetings after work with the principal union adherents and consulted with employees on their strategy in the organizing campaign. In addition, each of these supervisors, at the time of the hearing, had left or given notice of intention to leave the Respondent's employment. Despite their obvious bias against

the Respondent's interests, I nevertheless give credence to their testimony regarding the statements attributed to Andrews and Tobin. Not only was their testimony forthrightly and candidly given, but their statements are also consistent with a pattern found permeating the Respondent's hiring practices, discussed below.

J. The Asserted Hiring Freeze

There is much conflicting testimony concerning whether a hiring freeze was instituted by the Respondent after the commencement of the union organizing campaign. Andrews submitted that he felt the unionization effort reflected a lack of confidence in him personally, since most of the activity was being conducted by the newsroom staff. For this reason, he told his supervisors there was a hiring freeze, whenever they asked about filling a position. He stated, however, that no such freeze was imposed by the Respondent.

On the other hand, Kennedy and Doogan testified that on several occasions Andrews told them a hiring freeze existed. Kennedy testified that in early December, he was informed by Andrews that he would not be receiving any new employees on his staff. Doogan testified that there was a meeting of the supervisors, prior to the election, in which Andrews stated that the Respondent has instituted a hiring freeze. Doogan also testified that he had been informed privately of this fact by Andrews before the meeting.

Employee Wilson also testified that he was told by Todd sometime during the first or second week in January 1977, that as soon as the hiring freeze was over and "when things settled down," more reporters would be needed. As a result of this conversation, Wilson offered to assist in interviewing reporters, and used Todd's

credit card number to contact some prospects for employment.

Based on the admissions of Andrews, and the credited testimony of Doogan and Kennedy, as well as the unrefuted statements of Wilson regarding the hiring freeze, I find that the Respondent had curtailed the hiring of new employees to allow it to engage in a selective hiring practice which would screen out future employees sympathetic to unionization.

H. The Alleged Selective Hiring Practice

Employee Lynn Symonds testified that in September she asked Lloyd for a job on behalf of her younger brother. She was informed there were no openings available, but that her brother could come in and file an application. Symonds did not follow up on this until mid-December, when she again inquired about a job for her brother. Lloyd told her to have her brother come in

and make out an application for employment. According to Symonds, Lloyd then asked if her brother were for or against the Union. Symonds responded that she did not know, as she had never discussed the matter with her brother. Symonds' brother came in the following day, but was not hired by the Respondent.

Employee Jerry Davidson was hired by the Respondent on January 5, 1977, as a district manager in the circulation department. When he applied for employment, he was interviewed by Lloyd. Davidson testified that Lloyd asked if he were for or against the Union. Davidson replied that it didn't really matter. Lloyd then asked if he had ever been employed "under" a union, and he responded that he had not. According to Davidson, Lloyd then said it didn't matter as he would not be eligible to vote in the election because of his hiring date.

Lloyd denied questioning Symonds about the union sentiments of her brother and also denied asking Davidson about his union sentiments during the hiring interview. She testified that after management became aware of the Union's organizing effort, a statement was formulated which was read to all prospective employees.[19] The statement informed the job applicants of the organizing campaign of the Union and advised that they probably would be approached by members of the organizing committee. The statement also informed the applicants that management did not feel that a union would benefit the employees. The statement concluded on the following note:

> The only reason you are being told this is to give you adequate information so that you can have all the facts before deciding on employment with the Times. Whether you are in

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[19] Respondent's Exhibit No. 11.

> favor of the Union or not is your business, and the newspaper's decision to hire or not to hire is not dependent on your union view.

Lloyd stated that during the interview with Davidson, it was "possible" that she said it didn't matter whether he was for or against the Union, and the employee misunderstood her expression.

Having observed all of the witnesses testifying on this particular issue, I credit the testimony of Symonds and Davidson as opposed to that of Lloyd. The attempts by Lloyd to ascertain the union sentiments of prospective employees is consistent with similar conduct by other management officials previously found herein. In addition, I find Lloyd's statement that Davidson may have misunderstood her to be unpersuasive, as she did not impress me as a person who failed to clearly state her thoughts or leave any doubt as to the meaning of her words.

L. The Termination of Gabler

Gabler was hired initially by the Respondent as a copy editor and subsequently assigned to cover education news. As noted, she was active in the newsroom staff's effort to get management to increase their wages, and expressed her dissatisfaction over management's failure to disclose the wage range for the employment levels at the meeting in October. Gabler also attended the union organizing meeting on October 27 and signed an authorization card for the Union.

Gabler had applied for admission to paramedic school and was notified the first part of December that she had been accepted. Her training was scheduled to commence in mid-January 1977. On December 6, Gabler went to Andrews and informed him of her acceptance for paramedic training. She stated she would be leaving on January 17, 1977, and asked if it would be possible

for her to work for the Respondent on the weekends as a part-time employee. According to Gabler, Andrews replied that something could be worked out. The following day Gabler informed Todd about her plans to go to school and her desire to continue to work on a part-time basis with the Respondent. She also asked Todd if it were possible for her to work overtime until she started school. Gabler testified that Todd said he could use her on Saturdays and he would work her overtime, whenever he had the opportunity.

Gabler went to see Tobin that same day to advise him of her plans and to renew her request to work part time while undergoing paramedic training. According to her testimony, Tobin stated it would be "fine." During this conversation, the matter of the Union's organizing effort came up. Gabler told Tobin the reporters were not paid enough and, unless some changes were made,

employees would support the Union because there was nothing to lose. She stated that Tobin expressed the view that the Union would not help the situation.

Shortly after the first of January, Gabler spoke with Andrews and changed the date she intended to leave to January 14, because the school started the following week. She also renewed her request to be allowed to work on Saturdays. She testified that Andrews said, "Fine." She apparently had second thoughts and went back to Andrews to advance her departure date to January 13, stating that she would like to take a 3-day vacation before starting school. Andrews agreed to this.

Both Tobin and Andrews testified to the conversations they had with Gabler concerning her plans to attend paramedic school. Andrews stated that when Gabler made her request for part-time employment, he told her he would look into the matter.

Tobin testified that when Gabler made the same request of him, he advised her to let him know how she was making out in the paramedic program once she started, but he made no commitment regarding part-time employment. Tobin also testified that Gabler had been in to see him several times previously after the commencement of the union organizing campaign. He stated that she told him she was unhappy because the newsroom was dividing into cliques. It reminded her of a similar situation she had experienced when working for the Canadian Press and a union sought to organize the employees.

Gabler testified that on January 4 or 5, [20] she and Lloyd were invited to the home of Candy Pearson for dinner. Pearson

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[20] Initially, Pearson placed the date of the dinner as January 5 or 6. Lloyd, on the other hand, fixed the date as January 6 and supported her recollection by a reminder written on her desk calendar at work

was formerly employed by the Respondent but quit on January 2 to take another job. During dinner, a heated argument developed between Gabler and Lloyd over an article written about Atwood in a rival newspaper. The article indicated that, while Atwood was a wealthy person, he was a depression era reporter and paid his employees depression era wages. Gabler agreed with the substance of the article and Lloyd vigorously defended Atwood's policies. The argument became so intense that Pearson had to intervene.

(footnote 20 continued)

by Pearson on that date. In rebuttal, Pearson testified that the dinner occurred the evening after she had dinner with a male friend, who in turn testified that he had dinner with Pearson on January 4. In view of the conflict, I find that the most objective evidence establishing the date of the dinner is a notation in Pearson's handwriting on Lloyd's desk calendar. Accordingly, I find that the dinner engagement was on January 6, 1977.

In a memo to Gabler, dated January 6, 1977, Andrews confirmed January 13 as her final day at the newspaper, and wished her well in her "new pursuit." Andrews forwarded a oopy to the personnel office for action. Andrews testified that after the first of the year he had determined that he was fully staffed on Saturdays, which was the only day that Gabler would be available to work part time. Therefore, he decided he could not honor her request for part-time employment. Sunday Editor Doogan testified, however, that sometime before Gabler stopped work, he spoke with Andrews to find out if it were possible for her to work under his supervision on Saturday nights. According to Doogan, Andrews replied "We don't know where she is on this union business. She tells Bill [Tobin] one thing and other people something else." Doogan stated that Andrews asked him to see

if he could find out what Gabler's sentiments were concerning the Union.

Gabler did not receive the memo from Andrews in the interoffice mail until January 11, 1977. She immediately went to Andrews to verify that it meant she would no longer be employed after January 13. When she expressed disappointment in not receiving part-time employment, Andrews indicated that a position might be available after the election. Andrews testified he made this statement because he was aware that several employees had expressed an intention to leave, if the Union won the election. It is acknowledged by both these witnesses that Gabler stated that if she were employed by the Respondent on the date of the election, she would have voted for the Union. Andrews replied that "elections are won or lost by a single vote."

The next day Lloyd asked Gabler to come to her office. According to Gabler,

Lloyd stated she had heard that she (Lloyd) had told Andrews of the argument they had at Pearson's, and that was why Gabler was fired. Gabler testified that Lloyd denied having spoken to Andrews about the conversation, but stated that management had placed Gabler on the "undecided" list in determining who was for or against the Union.

M. The Payment of Sick Leave Benefits to Craft in January 1977

Craft testified that shortly before Easter 1976, she informed her supervisor (Hamilton) that she had to go to the hospital for surgery. Hamilton had the employee fill out a request for medical leave. Craft was out for 4 weeks and returned to work in late May or early June. Craft did not receive any sick leave benefits while she was out ill. Craft testified that she was unaware that the Respondent had any such benefits for the

employees. On December 8, however, the Respondent, as a part of its efforts to combat the Union's organizational campaign, issued a checklist of benefits available to the employees. Included among the benefits was a statement that upon completion of 3 months' employment, "an employee may be paid his full wages for the period he is ill, with his department head's approval." (General Counsel's Exhibit No. 85.) Craft questioned Molenda as to why she had not received sick benefits earlier in the year when she was ill. Molenda could not supply the answers, as Robin Smith was the head of circulation at that time. He contacted Lloyd and she promised to look into the matter. Craft testified that Lloyd later informed her that the failure to pay her sick benefits was an error. She told Craft that Molenda's predecessor mistakenly believed she had not been employed long enough to qualify for the sick benefits.

When Lloyd checked Craft's personnel records, she discovered that the employee did qualify and brought the matter to Tobin's attention. On January 4, 1977, Craft received $400 as "full sick pay."

N. The Implementation of the Revised Wage Review Program

Respondent's Exhibit Nos. 21 and 22 disclose that six employees were hired in June and still employed in September. Under the revised wage review policy, each was eligible for review and, if found deserving, a wage increase in September. None of these employees were reviewed in the month of September. Of this group, one employee received a 6-month review and wage increase on December 8 and another received a similar review and wage increase on December 22.

Four employees were hired in July and still employed in October, but were not given wage reviews in that month. Two of

the employees in this category were given reviews and wage increases on January 18, 1977. In one instance, it was described on the Respondent's records as a 6-month review, but in the case of the other employee, it was classified as a 3-month review. A third employee from this group was not given a wage review or increase until February 16, 1977.

Of 12 employees hired in August and still employed on November 9, none received a review or wage increase in November. Five of these employees received 3-month reviews and wage increases on December 8. Two employees from this group received 6-month reviews on January 19, 1977, but only one received a wage increase as a result of the review. One employee from this number did not receive a review until March 2, 1977.

The Respondent's records indicate that 14 employees were hired in September. From

this number, 13 were still employed in December and thereby eligible for a wage review under the Respondent's revised policy. The data reflects that 10 of these employees received 3-month wage reviews and increases, but only three received them in the month of December. Three other employees from this group were reviewed and granted wage increases on January 18, 1977. Four employees falling in this category received reviews and wage increases on January 19, 1977. The wage increases of two employees from this latter group were made retroactive to December 22 of the preceding year. Finally, the remaining three of the September hires received wage reviews and pay increases on March 16, 1977--these were classified as 6-month reviews on the Respondent's records.

Ten employees were hired in October, and nine were still employed during the month of January 1977. The Respondent's

data shows that six of this group received reviews and wage increases on January 18, 1977. One employee was reviewed in January 1977, but received no pay increase. The job of another from the October group was upgraded in November and, while she received a pay increase at that time, there was no wage review reflected on the records. The job of the final employee in this classification was reevaluated in December and she received a wage increase as a result of that action. However, this employee never received a wage review in the month of January.

Additional data supplied by the Respondent (Respondent's Exhibit Nos. 23 and 24) revealed that 27 employees received wage reviews and pay increases either on January 18 or 19, 1977.[21] Of the group

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[21] This does not include employees, shown on the Respondent's records, who received promotions or whose jobs were upgraded, thereby resulting in a wage increase.

of employees who received wage reviews and pay increases commencing 2 days before the election, nine reviews and increases were 3 or more weeks late. The reviews and wage increases of four other employees were accelerated by 2 or more weeks before the time they would normally have been given under the Respondent's revised wage review program.

Concluding Findings

Unlawful Interrogation:

The credited testimony conclusively supports the finding that several management officials and supervisors engaged in unlawful interrogation of employees in a number of instances. While this particular type of conduct was not isolated or confined to any one operational segment of the Respondent's establishment, the most persistent offenders were in the newsroom.

Andrews admitted that he considered the campaign to unionize the employees

to be a personal reflection upon him because the newsroom staff was in the forefront of the effort. He called Brown into his office the latter part of October and informed her that management considered her one of the leaders of the organizing effort, and that he did not understand what the employees' gripes were about. He accused Brown of being evasive in her response to him and told her that only weak people needed the assistance of a union. In a similar vein, when Andrews called employee Gerjevic into his office in November to inform him that he was being given a pay raise, he asked if the employee had been pressured by the Union. Andrews also spoke to employee Matthews in his office in late November or early December regarding the Union. The credited testimony indicates that Matthews had previously shown Andrews a blank authorization card in a prior discussion about the Union.

Andrews exhibited an awareness that his questioning of the employee was not lawful by prefacing his remarks with the statement that his questioning might or might not be legal. During the course of this conversation, he asked the employee if he had made up his mind about "the union thing yet?"

In each of these instances Andrews initiated the conversations and made clear his opposition to unionization of the employees. As managing editor, he represented higher level management and, in these circumstances, his comments were coercive and interfered with the statutory rights guaranteed the employees by Section 7 of the Act. In addition, at no time during any of these conversations did Andrews give the employees any assurances that reprisals would not be taken against them. Accordingly, I find that in each of the instances cited above the Respondent, through its agent Andrews, committed

separate violations of Section 8(a)(1) of the Act. Florida Steel Corporation, 224 NLRB 45 (1976); Hanes Hosiery, Inc., 219 NLRD 338 (1975).

The interrogation of the employees in the newsroom was not limited to Andrews. On the basis of the credited testimony, it is evident that City Editor Todd made several attempts to elicit information from employees regarding their attitudes toward the Union and to discover whether they had signed authorization cards. Shortly after the representation petition was filed, Todd asked Sarah Wilson "what her leanings were" concerning the Union. He also told William Wilson that he was conducting a poll, and wanted to know how the employee would vote in the representation election. On November 2, Todd asked employee Sampson "how he felt about this union thing." Although Todd advised the employee he need not answer, he went on to ask if Sampson

had signed an authorization card. These separate interrogations concerning employee attitudes toward the Union, coming from the city editor and made at a time when the Respondent's opposition to the unionization of its employees was well known, are, in my judgment, coercive and interfered with the Section 7 rights of the employees. Todd's polling of the employees in these circumstances served no legitimate purpose and was nothing more than a continuation of management's efforts to determine the extent of employee support for the Union during the organizational campaign. In these circumstances, I find that Todd's questioning of both Wilsons and Sampson violated Section 8(a)(1) of the Act. American Commercial Bank, 226 NLRB 1130 (1976); Florida Steel Corporation, supra.

I also find the statements made to employee Brown by Associate Editor and General Manager Tobin to be a separate

violation of Section 8(a)(1) of the Act. When Brown went into Tobin's office, he asked her what kind of a conspiracy were the newsroom employees plotting. He asked if the employees were trying to organize a union. Tobin told the employee that the Respondent didn't expect employees to stay forever and if she were not satisfied, she should seek employment elsewhere. Management's hostility toward unionization of its employees was implicit in Tobin's remarks. In addition, his comment that Brown should seek employment elsewhere if she were dissatisfied was nothing more than a veiled threat that if the employee persisted in her activities, her job status would be in jeopardy. I find therefore, that Tobin's remarks to Brown were violative of Section 8(a)(1) of the Act when considered alone, but even more so when considered in the context of the other extensive unfair labor

practices committed by high level management. Florida Steel Corporation, supra.

The unlawful interrogation of employees also occurred in the circulation department. Molenda, director of circulation, called employees Craft, Moore, and Broste to his desk as a group in mid-December, when he assigned them group-leader responsibility to replace Hamilton. During his discussion with these three employees, Molenda asked if they were prounion. Although he told the employees that they need not answer, the question was clearly unlawful; especially when the circumstances surrounding the asking of the question was considered. Molenda, the head of the department, was assigning the employees more responsible duties, but made it clear that the assignment was on a temporary basis until it was determined how well the three employees performed their jobs. By injecting a question concerning their union

sentiments and attitudes, Molenda's questioning took on a more coercive character. Each of the employees could reasonably have concluded that her permanent assignment as a group leader depended upon a declaration that she was opposed to the Union. I find that Molenda's interrogation of the employees in this regard to be a violation of Section 8(a)(1).

Finally, Lloyd's questioning of employee Symonds regarding her brother's union sentiments, when Symonds was inquiring about a job for him, constitutes another violation of Section 8(a)(1). By asking the employee if her brother was for or against the Union, Lloyd not only conveyed the impression that future employees would be screened on the basis of their union sentiments, but that existing employees would be judged by this standard as well. Accordingly, I find Lloyd's conduct

in this regard to be a separate violation of Section 8(a)(1) of the Act.

Surveillance and Impressions of Surveillance:

The uncontroverted testimony establishes that Molenda urged Hamilton to send two employees to a union organizing meeting for the purpose of reporting back to management, and, further, that Molenda, himself, sent two other employees for the same purpose. Encouraging employees to attend union meetings and to report back to management is clearly a request for employees to engage in surveillance of the union and protected activities of other employees. To solicit assistance of employees for this purpose and to cause them to actually engage in such surveillance of the activities of coworkers is coercive and imposes unlawful restraints on the statutory right of employees to organize and engage in union activities. I find,

therefore, that the Respondent committed an additional violation of Section 8(a)(1) of the Act when Molenda and Hamilton caused employees to attend the union organizing meeting and report back to management. Harris-Teeter Supermarkets, Inc., 231 NLRB No. 177 (1977); Elder-Beerman Stores, Corp., 173 NLRB 566 (1968), enfd. 415 F.2d 1375 (6th Cir. 1969). Cf. Pope Maintenance Corporation, 228 NLRB No. 20 (1977).

In addition to engaging in actual surveillance of employees' union activities, the record discloses that the Respondent created an impression of engaging in surveillance. On the basis of the credited testimony I have found that on December 13, City Editor Todd told Sarah and William Wilson that higher level management was observing to see which employees attended the representation hearing. Todd cautioned Sarah Wilson not

to attend, while indicating that William Wilson's attendance had been discussed and considered permissible by management, as it was in the area of his news coverage as labor reporter. The explicitness of Todd's statement to these two employees left little doubt that management would be observing the employees attending the representation hearing. Furthermore, when Todd replied affirmatively to William Wilson's question as to whether it would be considered a "black mark" against the employee, his statement clearly implied that management would engage in some form of reprisal against employees whose attendance was not approved. I find Todd's statements to this effect to be coercive and intimidating and violative of Section 8(a)(1) of the Act. Cf. The Stride Rite Corp., 228 NLRB No. 22 (1977).

The Threat of Loss of Employment:

The credited testimony of employee Bonney concerning discussions with King, a lower level supervisor, in the mailroom on the effects of unionization of the employees is the basis for finding a further violation of Section 8(a)(1) of the Act. King informed Bonney and employee Aikenhead that if the Union became the bargaining representative, the drivers would be laid off and most of the delivery routes would be contracted out. He also indicated to the employees that their own particular jobs would be in jeopardy, as the Respondent would not be able to afford employing two of them in the mailroom.

It is evident from King's statements that the predicted loss of jobs and contracting out of delivery routes would not be the result of factors beyond the Respondent's control, but would occur as a reprisal against the employees for having

selected the Union as their bargaining representative. Threats of this nature are coercive and violate Section 8(a)(1) of the Act. N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 618-619 (1969).

Similarly, Molenda's statement to the employees in the circulation department that the Respondent would find it cheaper to replace them and install computers, if they became unionized, is more than a mere prediction of action taken out of economic necessity beyond the Respondent's control. Rather, it is a threat of retaliation based on coercion. Gissel, supra. Accordingly, I find Molenda's comment to the employees in the several meetings to be additional violations of Section 8(a)(1) of the Act.[22]

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[22] The General Counsel argues that Todd's statement to William Wilson that the working environment would become similar to that of an automobile assembly line is a threat to impose more stringent working

The Solicitation of Grievances:

As previously noted, Andrews felt the union organizing effort reflected a lack of confidence in him. By his own admission, he asked employee Brown what the employees' gripes were, and did so to see if he couldn't do something about them. In a similar fashion, shortly after the organizing effort became known to management, Todd asked Employee Sampson what were the employees' complaints that management might address itself to, other than the money issue. Sampson supplied Todd with a memorandum setting forth the matters troubling the employees and Todd showed it to Andrews.

Although there were no specific promises by Andrews or Todd to take action

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(footnote 22 continued)

conditions. I do not find this to be the case. As a result, I do not regard the statement to be a violation.

on the complaints, their requests clearly implied, as indeed Andrews admitted, that management would address itself to the employees' grievances in order to demonstrate the lack of need for unionization. When viewed in the context of the extensive unlawful interrogation found herein, involving these same management officials, the solicitation of grievances for this purpose is unlawful and constitutes a further violation of Section 8(a)(1) of the Act. Federal Yeast Corporation, 226 NLRB 1046 (1976); Reliance Electrical Company, Madison Plant Mechanical Drives Division, 191 NLRB 44 (1971).

The Transfer of Employee Hein:

Hein's transfer to the Juneau office in November is not alleged to be a violation. However, the unrefuted statement by Todd to employee Sampson, that the Respondent wanted Hein out of town because Hein wanted to be the union steward, is alleged

to be violative of the Act. Hein was the political reporter and a logical selection for the Juneau position. Nevertheless, Todd's statement to Sampson concerning the reason for Hein's selection was coercive and an impermissible interference with the Section 7 rights of the employees. By informing Sampson that Respondent wanted Hein out of town because he had aspirations about becoming the union steward, Todd was making it clear to the employee that the Respondent would not only interfere with the right of the employees to be represented by a union, but would also take steps to nullify the effectiveness of any such representation by transferring an employee who was known to be one of the leaders behind the union movement. In these circumstances, I find that Todd's comments violated Section 8(a)(1) of the Act.

The Hiring Freeze and the Selective Hiring Policy:

While it is alleged that the Respondent had instituted a hiring freeze in mid-November (after the filing of the petition), it is apparent from the credited record testimony that the "freeze" was more in the nature of a hiring curtailment. Further, it was imposed in order to allow the Respondent to engage in a selective hiring practice, whereby applicants for employment were screened to determine whether they were sympathetic toward unionization. This is reflected in the statements of Personnel Director Lloyd to employee Symonds, when she asked if Symonds' brother was for or against the Union. It is also reflected in Lloyd's questioning of Davidson about his union sympathies during his job interview in early January. That she later decided Davidson's attitude toward unionization was

not of concern, since he would not be eligible to vote in the election, only serves to underscore the fact that the Respondent was indeed screening applicants to avoid hiring possible union supporters.

While the text of the prepared statement Lloyd presumably read to job applicants is harmless on its face, the credited testimony reveals that she went far beyond its contents. She actively attempted to ascertain the sentiments of the job applicants regarding unionization before making a decision to hire them. Further evidence of this practice is found in Molenda's statement to Hamilton that Lloyd would so question job applicants.

The Board has consistently held that questions asked concerning union preference during a job application interview are inherently coercive; especially when the interview is conducted in the midst of a union organizing campaign. Russell Stover

Candies, Inc., 221 NLRB 441 (1975); Bendix-Westinghouse Automotive Airbrake Co., 161 NLRB 789 (1966). Accordingly, I find this conduct to be a further violation of Section 8(a)(1) of the Act.

The Failure to Employ Godwin in November and December:

The General Counsel contends that Respondent failed to employ Mark Godwin as a sportswriter because he did not take an antiunion stand during his interviews with Andrews and Tobin. I find the record does not support this contention. Although Godwin applied for a job as a sportswriter, at the urging of Kennedy, there is no evidence that such a position was available or that management contemplated increasing the size of the sports staff. There is merely Kennedy's request for an additional person, which management refused to authorize on more than one occasion. Thus, it would be mere speculation to hold that

Godwin was discriminatorily refused employment as a sportswriter when the record evidence shows that such a position was not open on the Respondent's staff. For this reason, I find that the General Counsel has failed to support this allegation of the complaint by a preponderance of the evidence, and that it should be dismissed.

The Termination of Gabler:

I find that the record supports the conclusion that Gabler's request for part-time employment, while attending paramedic school, was denied by the Respondent because of an uncertainty about how she stood on the union issue. While I do not find Lloyd's statement that the Respondent placed the employee on an "undecided" list to be evidence of an unlawful motive in refusing to honor her request. Further evidence of the underlying motive is found in Andrews' comments to Doogan, when the

latter asked that Gabler be allowed to work for him on Saturdays. Andrews complained that the management was uncertain where she stood on the union matter, and asked Doogan to attempt to find out. Finally, Andrews' statement to Gabler that "elections are won or lost by a single vote" clearly establishes, in my judgment, that the employee's position regarding the Union was a critical factor in management's decision not to honor her request for part-time employment. Although the Respondent contends that Gabler was the education reporter and there were no duties which could be performed in this area on Saturdays, I find this explanation unpersuasive. Unlike the situation with Godwin, it is evident that her services could have been used by the Sunday editor, and that Andrews would have honored his request had he been certain that the employee was antiunion. For these reasons,

I find that the Respondent's refusal to allow Gabler to work part time violated Section 8(a)(3) of the Act, as it was caused, in part, by the employee's failure to express an antiunion preference.

The Payment of Sick Benefits to Elaine Craft:

The amended complaint alleges that the payment of sick leave benefits to Craft on January 4, 1977, constituted a conferral of benefits to persuade the employee to vote against the Union in the pending election. There is no question that Craft did not receive sick benefits for the 4-week period she was out ill during the preceding May. Considering the Respondent's explanation for this failure and the manner in which it sought to correct the matter, once the oversight was discovered, I do not find any merit to the contention that the payment of these benefits was for an unlawful purpose.

Smith, Craft's then supervisor, credibly testified that when Craft was out ill, he was under the mistaken impression that she had not been employed long enough to qualify for sick leave benefits. Craft, who was unaware the Respondent had a policy of paying sick leave benefits to employees, did not discover that she was entitled to the benefits until the latter part of December. As soon as Craft brought the matter to the attention of Molenda, her current supervisor, he immediately checked with Lloyd in the personnel office. The record reflects that management promptly discovered that the failure to pay the sick benefits to Craft was the result of Smith's miscalculation on the length of her employment, and a $400 payment was made to Craft shortly thereafter.

Although the timing of the payment to Craft, occurring 16 days before the election and during the extensive antiunion

campaign by the Respondent, gives rise to a suspicion concerning the motive for granting the benefits, I find that suspicion to be dispelled when the total circumstances surrounding the payment are considered. In the absence of any other evidence indicating an impermissible purpose, I find that the payment was a result of a reasonably quick response by management to correct an error, once it became known. Thus, I find the record does not support this allegation of the complaint, and it is dismissed.

The Implementation of the Revised Wage Review Program:

When the wage history records submitted by the Respondent are closely analyzed, they compel the conclusion that the Respondent did in fact use its wage review policy to undermine the Union's support among the employees. It is evident that the Respondent's concern about the high rate of employee turnover caused it to enlist the

services of a company owning a chain of newspapers, similar in character and size, to make recommendations designed to reduce this problem. But the record does not reflect a genuine followthrough on this concern by the Respondent until the union organizing campaign became known and the petition for representation was filed.

The testimony of management indicates that on July 26, a policy decision was made by the Respondent to initiate wage reviews after 3 months, 6 months and 1 year of continuous employment, and yearly thereafter on the anniversary date of employment. This program was to begin the following September. However, the wage history data belies the Respondent's claim that the program was implemented lawfully as the Respondent asserts. None of the employees who should have received reviews and possible wage increases were so reviewed during the months of September,

October and November, when the program is alleged to have become effective. The earliest date this group of eligible employees began receiving their wage reviews and resultant pay increases was December 8--approximately 3 weeks after the filing of the Union's petition for a representation election.[23] More damaging, however, is the fact that an inordinate number of reviews and pay increases were given to employees on January 18 and 19, 1977--1 and 2 days prior to the secret ballot election. Of these, many were 3 or more weeks late and a number were accelerated by 2 or more weeks. Lloyd's explanation that the reviews and pay increases were usually delayed by at least 14 days, due to the press of business

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[23] This, of course, does not include the across-the-board, cost-of living increase granted all employees on October 13, 1976.

activities, is not persuasive. The records indicate that the average delay for the January 18-19 group far exceeded the "usual" 14 days. But even if this pattern of delay is considered customary for the Respondent's operations, which I find is not the case, management, nevertheless, found it possible to alter this pattern by accelerating a number of wage reviews and pay increases immediately prior to the election.

There is no requirement that an employer refrain from granting benefits during the pendency of an election where the benefits are the result of a management decision made prior to the union organizing campaign. But an employer cannot deliberately delay, on the one hand, and accelerate, on the other hand, the granting of such benefits, so as to cause the employees to receive them at a time most likely calculated to influence the results of the

election and undermine support for the Union. United Cable Television Corporation of Connecticut, 224 NLRB 1332, 1336 (1976).

The record here clearly shows the Respondent (a) did not follow its wage review program in a timely fashion until after the filing of the representation petition by the Union, (2) delayed granting wage reviews and increases so that the benefits were received shortly before the election, and (3) prematurely granted other wage reviews and increases so that these benefits were also received shortly before the election. When considered alone, this evidence compels the overwhelming inference that the Respondent manipulated its wage review program to defeat the unionization of the employees. When considered in the context of the extensive unlawful conduct found herein and the Respondent's clear antipathy toward the Union, it is evident

that the Respondent engaged in this stratagem for an unlawful purpose in violation of Section 8(a)(1) of the Act.

IV. The Issue of the Union's Majority Status

The consolidated complaint alleges that since November 13, and continuing to date, the Union has been designated the collective-bargaining representative by a majority of the employees in the unit. In support of this claim, the General Counsel offered into evidence 101 signed authorization cards.[24] The Respondent contested the validity of the cards on the ground that they were solicited solely for the purpose of securing an election and were not valid designations of the Union as the collective-bargaining representative of the card signers.

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[24] The card of one employee, Edward Bogus, was subsequently withdrawn by the General Counsel, thereby reducing to 100 the number of cards offered for consideration.

Preliminary to resolving the issue regarding the validity of the authorization cards, however, is the question of the number of employees to be included in the bargaining unit. A stipulation was received and subsequently modified by the parties indicating that on November 13 and 14 there were 180 employees in the unit. (General Counsel's Exhibit No. 104). However, the parties subsequently became involved in a dispute regarding the unit placement of employee Raymond Tyson, whose name was included on the stipulated list, and employee David Rochin, whose name was not included thereon. On the basis of the representation by the parties at the hearing, I find they were in agreement that at least 179 employees were properly included in the unit commencing November

13.[25] Thus, the actual size of the bargaining unit depends upon the determination of the unit placement of the above-mentioned employees.

David Rochin: The testimony and the Respondent's records reveal that Rochin was employed by the Respondent for a period of 3 days--November 13-15. This employee testified that when he was hired, he was promised he would work 40 hours a week. His timecards (Respondent's Exhibit Nos. 6 and 7) disclose that he worked 6-1/4 hours on November 13, 8 hours on November 14, and 6 hours on November 15. Rochin testified that he received a better job offer from Safeway and quit his job with the Respondent. On the basis of this unrefuted

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[25] This differs by one from the number cited in the General Counsel's brief. It is evident that the General Counsel included the name of Raymond Tyson on the list and then subsequently dealt with that same employee's name as an addition to the list.

testimony, I find that Rochin was hired as a permanent employee by the Respondent and was properly a part of the bargaining unit on November 13 through November 15. The fact that he voluntarily quit to take another job after November 15 in no way diminishes his employee status as of the period stated above.

Raymond Tyson: This individual was classified as "bureau chief" of the Respondent's Palmer office. However, this is something of a misnomer as the Palmer office consists only of one person--Tyson. Palmer is considered a suburb of Anchorage and is located approximately 40 miles away. Tyson testified he was responsible for negotiating the space for the one-room office for the Respondent, subject to the approval of Andrews, the managing editor. Tyson's duties at the Palmer office were similar to the duties he performed when he

was located in the main office in Anchorage, except that he was responsible for covering all phases of the news in the Palmer area. Tyson testified that he was required to get approval from the city editor or whoever else was in charge of the newsroom in Anchorage in order to work overtime, and that he normally adjusted his hours in order to compensate for having worked extended hours on a given assignment. Although there is some claim by the Respondent that Tyson is a supervisory or managerial employee, I find this position to be without merit. Clearly, the only person Tyson supervised was himself, and it is evident that he is required to account to the newsroom supervisors in Anchorage for his activities. On this basis, I find that Tyson is a reporter with no more authority than any of the other reporters in the newsroom, although he is physically stationed some distance away from the

Respondent's main office. Accordingly, I find that Tyson is properly included in the bargaining unit.

On the basis of the above determination regarding Rochin and Tyson, I further find that the bargaining unit consisted of 181 employees as of November 13, and the Union's majority status, or lack thereof, must be measured against this number.

The Respondent contested the authentication of signatures on a number of cards wherein individuals who witnessed signing or who received the cards from the signatories testified to that effect. This attack on the cards is without merit as the Board and courts have long sustained this manner of authenticating signatures on authorization cards. Don the Beachcomber, 163 NLRB 275 (1967); Martin Electronics, Inc., 183 NLRB 66 (1970); Amalgamated Clothing Workers of America, v. N.L.R.B., 419 F.2d 1207 (D.C. Cir. 1969), cert.

denied 397 U.S. 988. The main thrust of the Respondent's contention regarding the cards, however, was that they were solicited solely for the purpose of securing an election and therefore were not valid designations of the Union as the collective-bargaining representative of the card signers under the Cumberland Shoe doctrine.[26]

As previously noted, a number of employees attended the several meetings conducted by Coleman. I credit his unrefuted and forthright testimony concerning the statements he made to the employees regarding the purpose of the cards and their intended use. There is nothing in Coleman's comments which negate the unambiguous language contained on the face of the cards authorizing the Union to repre-

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[26] Cumberland Shoe Corporation, 144 NLRB 1268 (1963).

sent the card signers for purposes of collective bargaining. As the Supreme Court stated in the Gissel decision,[27] at 606-607:

> . . . [I]t [is] sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says a signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election . . . .

The Board in restating its Cumberland Shoe doctrine in Levi Strauss stated:

> Declarations to employees that authorization cards are desired to gain an election do not under ordinary circumstances constitute misrepresentation either of fact or of purpose . . . . Where the Union did use the evidence of employee support reflected by the cards to get an election, such declarations normally constitute no more than

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[27] N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1968).

> truthful statements of a concurrent purpose for which the cards are sought.[28]

It is evident from the testimony that Coleman explained to the employees that the Union could request recognition, if 51 percent of the employees signed cards. But he did not anticipate that the Respondent would grant such recognition, and the Union intended seeking an election. These comments were entirely consistent with the authorization purpose expressed on the face of the cards. Accordingly, I find that all employees who signed cards at the meeting conducted by Coleman, or who took cards at that meeting and subsequently signed them, were executing a valid authorization for the Union to be their collective-bargaining representative. These cards are to be counted in determining whether the Union acquired majority status in November.

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[28] Levi Strauss & Co., 172 NLRB 732, 733 (1968).

The record discloses that the following employees fall into the above category:

Mary K. Brown	Liisa May
Mike Campbell	Beth McCullough
Lynn Conway	Bette Mead
Patricia Coty	Brenda Mitchell
Elaine Craft	Elaine Moore
Kathryn Delgado	Marilyn Nagy
William Pat Dougherty	Barbara Riggs
Fran Durner	Carl Sampson
Beverly Gearhart	John Spahr[29]
Edward Hein	Jacqueline Teague
Janet Humphrey	Sarah Wilson
Francine Leppanen	Rhonda Woitel
John Matthews	Pamela Young

The testimony of the following employees clearly indicates that they were

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[29] This employee testified that while he attended the meeting at the Keyboard Lounge, he was late and didn't recall Coleman stating the purpose of the authorization card. He further testified that he only remained at the meeting for approximately 10 minutes. Coleman, on the other hand, recalled that Spahr asked questions which he endeavored to answer, and that the employee was at the meeting for approximately 1/2 hour. I credit Coleman in this regard, and I find that Spahr was informed that the purpose of the card was for union representation as well as for getting an election. In spite of Spahr's contrary testimony, I find that his card is a valid authorization for representation by the Union.

authorizing the Union to represent them in collective bargaining. Consequently, Their cards are considered valid authorizations to be counted in determining the Union's majority status:

Edward Arcury
Richard Bujol
Emma Cobb
Kerry Coughlin
William Fejes
Kris Fortier
Ann Gabler
Robyn Jewell
Carol Krizan
Frank McGuire
Steve Orta
David Rochin
Nancy Ross
Georgia Scott
William Slone
Raymond Tyson
Beatrice Watkins
Russell Webb
William Wilson

The cards of the following employees were stipulated into evidence as being valid for all purposes:

Shawn Bonney
Coleen Williams

In addition, the cards of the employees listed below were stipulated into evidence as containing authentic signatures and proper dates. There was no evidence elicited casting doubts on these cards and they are included as valid authorizations:

Robert Bacolas	Candace Pierson
Vicki Cunningham	Susan Pollock
Alfred Dixon	Elizabeth Ridenour
Patti Epler	Barbara Rogers
Richard Fuxjager	Kathy Sheets
Kathy Johnson	Joyce Weaver
Andrea Mosby	

The unrefuted testimony indicates that a number of employees solicited signatures on authorization cards from their coworkers. In each instance that the solicitation was successful, the card was signed in the presence of the solicitor or taken by the employee and subsequently signed and returned to the solicitor. Although the Respondent broadly attached the validity of the cards on the grounds that they were solicited solely for the purposes of an election, the following cards were properly authenticated by the card solicitors, and there is no counter-vailing evidence in the record to cast

doubt on them as valid authorizations for representation.[30]

Accordingly, they are properly included in ascertaining whether the Union achieved the majority status:

Card Solicitor	Card Signer
K. Brown	Cathleen Fleming Barbara Parker Louise Redmon Phillip Reznek Charles Scott
Russell Webb:	Glen Aikenhead Jessie Austin Reginal [sic] Bright Raymond Chandler Norman Hood James Johnson David Trimble Willie Tuft
William Wilson:	Mary Jo Ferrise
Nancy Ross:	Mark Fosterwald Gir-Hyun Kim Brian Leo Debra Lynn Slabach

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[30]Where there is testimony or evidence proporting to negate the validity of specific cards, they will be dealt with individually, infra.

Card Solicitor	Card Signer
Francine Leppanen:	Carol Brown Mary Crabtree Doloris Davila Leola Lowery Michelle Michaud Peggy Reilly Deborah Shaffer Kim Shaughnessy Jeanne Young
Jacquline Tague:[sic]	Lee Ann Gardner
Barbara Riggs:	Vandelette Gaither
Georgia Scott	Bonnie Osgood

A number of the card signers testified at the hearing. On the basis of their description of the circumstances surrounding the solicitation of their signatures, the Respondent contends these individuals were informed that the cards were only for purposes of securing an election. In examining these employees, counsel for the Respondent elicited testimony concerning their subjective motivation in signing the cards, as well as testimony regarding he circumstances under which the solicitations were made. But, as the Supreme Court

stated in Gissel, supra, this type of inquiry is "unreliable." Hence, I place no reliance on this type of testimony in making my determination of the validity of the cards.

Frank Gerjevic: This witness received a card from Hein. He testified he was asked if he were interested in the union drive, and told one of the reasons his signature was needed was to get an election. I find nothing in this representation which indicates that the only purpose of the card was to make an election possible. Rather, it was consistent with the dual purpose for which the Union announced it was seeking signatures on cards, i.e., an election and authorization to represent the employees. Levi Strauss & Co., supra. Accordingly, I find this card to be a valid authorization which is to be counted in determining the Union's majority status.

Kathleen Bibler: This employee testified she received a card from Leppanen. She stated that Leppanen asked her to sign it and give it back as soon as possible. Bibler testified that while Leppanen never informed her of the purpose for which the card was to be used, she had heard from several other employees that the card would be used to secure an election. The witness testified that she read the card before signing it and returning it to Leppanen. On the basis of this testimony, it can hardly be said that the card solicitor was informing the employee that the card was for a purpose other than indicated on its face, even though the employee was aware that the Union was contemplating seeking an election. In these circumstances, I find Bibler's card to be a valid authorization.

Cynthia Lilagan: This employee testified that she received a card in the mail. She read the card at home and signed

and returned it to the union organizing committee. In these circumstances, it is clear that Lilagan's card was valid authorization for representation by the Union, and it will be so counted.

Two cards were submitted by the General Counsel for which there was no authentication by the card solicitors or testimony from the card signers. These were the cards of Joseph McGuire and Vernon D. Walker. Specimen signatures were submitted from the Respondent's records for comparison with the signatures contained on the cards.[31] On the basis of my examination of the specimens and the signatures

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[31] Although the Respondent submitted the specimen signatures, it took the position that it could not vouch for the authenticity of the specimens themselves. I reject this attempt to cast doubt upon the specimens, as they were obtained from the Respondent's own records, and certainly purport to be the signatures of the individuals indicated thereon.

contained on the authorization cards, I find that these cards were signed by the individuals whose names are contained thereon. Accordingly, I find these to be valid authorization cards. Heck's, Inc., 166 NLRB 186 (1967).

Summarizing my determinations regarding the cards, I find that by at least November 14, 1976, the Union had secured 94 valid authorization cards from the Respondent's employees. As I have previously found that the unit consisted of 181 employees, these cards represent a designation of the Union as the representative for purposes of collective bargaining by more than 51 percent of the unit. In view of this determination, it is unnecessary to consider the additional cards submitted into evidence by the General Counsel.

V. Ruling on Objections

The objections, with the exception of paragraph F of the Regional Director's

Second Supplemental Decision, track the unfair labor practices alleged in the amended consolidated complaint. As to paragraph F, I have found that Supervisor Molenda did not hold a campaign meeting among the circulation department employees within the 24-hour period preceding the election. Accordingly, I recommend that the Regional Director's dismissal of this objection be sustained by the Board. Having found that the Respondent committed numerous violations of the Act by unlawfully discharging employee Gabler, unlawfully interrogating employees regarding their union sympathies, unlawfully encouraging employees to engage in surveillance of union activities of other employees, unlawfully giving an impression of engaging in surveillance of employees' protected activities, unlawfully threatening employees with loss of jobs if the Union

became the bargaining representative, unlawfully engaging in a selective hiring practice, and unlawfully granting pay increases to employees in order to influence the results of the pending secret ballot election by undermining support of the Union, I shall recommend that the election conducted on January 20, 1977, in Case No. 19-RC-8221 be set aside. Further, as I find merit to the General Counsel's request for a bargaining order in this matter, infra, I shall also recommend that the petition in the representation case be dismissed and all proceedings thereunder vacated.

VI. The Request for a Bargaining Order

The General Counsel contends that the unfair labor practices here are so pervasive and extensive "that the possibility of erasing" their effects upon the employees and "insuring a fair rerun election by the use of traditional remedies

is slight." Therefore, employee sentiment, as expressed by the authorization cards, is best protected by a bargaining order. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 612 (1968). In the circumstances presented by the instant case, I find this contention has merit.

The numerous and persistent acts of unlawful interrogation by higher level management, the selective hiring policy based upon unlawful questioning of job applicants or employees seeking to arrange employment interviews for job applicants, the use of employees to engage in surveillance, and the creating of an impression among employees that management was engaging in surveillance of their union and protected activities, as well as the threats of loss of employment are collectively sufficient to warrant a determination that a fair rerun election could not be

held. Equally pernicious, in my judgment, is management's manipulative use of the wage review program to undermine their support for the Union and influence the outcome of the election. It is reasonable to conclude that the total cumulative effect of these unfair labor practices, coupled with the additional unlawful refusal to employ Gabler on a part-time basis, will be a lasting one, and the conditions necessary for providing a fair expression of employee sentiment in a rerun election will not be achieved by a traditional cease and desist order. For these reasons, I find that a bargaining order is warranted, in the circumstances of this case, in order to best protect the rights of the employees. Gissel Packing Co., supra; Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1, 228 NLRB No. 16 (1977). Inasmuch as the

complaint does not contain an 8(a) (5) refusal to bargain allegation and there is no evidence of any demand for recognition by the Union, the bargaining order shall be retroactive to the date the Union obtained majority status as reflected by the valid authorization cards. Trading Port, Inc., 219 NLRB 298 (1975); Q. P. Putnam's Sons, Inc., 226 NLRB 1256 (1976); Beasley Energy, Inc., supra.

Conclusions of Law

1. The Respondent, Anchorage Times Publishing Co., is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 1547, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees regarding their union sentiments and desires, the

Respondent has violated Section 8(a)(1) of the Act.

4. By causing employees to engage in surveillance of the union activities of other employees, the Respondent has violated Section 8(a)(1) of the Act.

5. By creating an impression that the union and protected activities of employees were under surveillance by management officials, the Respondent has violated Section 8(a)(1) of the Act.

6. By threatening employees with loss of employment if the Union became their bargaining representative, the Respondent has violated Section 8(a)(1) of the Act.

7. By questioning job applicants about their union sentiments and desires, the Respondent has violated Section 8(a)(1) of the Act.

8. By engaging in a selective hiring

practice based on the prospective employees' union sentiments, or lack thereof, the Respondent has violated Section 8(a)(1) of the Act.

9. By timing the granting of employee wage increases so as to undermine the Union and influence the results of a secret ballot election, the Respondent has violated Section 8(a)(1) of the Act.

10. By refusing to continue the employment of Ann Gabler on a part-time basis after January 13, 1977, because of an uncertainty regarding her union sympathies, the Respondent has discriminated against her in violation of Section 8(a)(3) of the Act.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent

has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, the Respondent shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully refused to continue Ann Gabler's employment, on a part-time basis, after January 13, 1977, it shall be recommended that she be ordered full and immediate reinstatement to a position in the newsroom, on a part-time basis, or if such a position does not exist, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and, further, that she be made whole for any loss of earnings she may have suffered by reason of the unlawful discrimination against her. Backpay shall be computed with interest thereon, in the manner described in F. W. Woolworth Company, 90

NLRB 289 (1950); and Florida Steel Corporation, 231 NLRB No. 117 (1977).[32]

Having determined that a bargaining order is the only effective remedy in this case, the Respondent shall be ordered to recognize, effective from the date beginning November 14, 1976, when the Union achieved majority status, and, upon request, bargain collectively and in good faith with the Union as exclusive representative of all employees in the unit found appropriate herein.

Because the Respondent's unlawful conduct goes to the very heart of the Act, it shall be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed employees by Section 7 of the Act. N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532 (4th Cir.

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[32]See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

1941); Electrical Fittings Corp., a subsidiary of I-T-E Imperial Corporation, 216 NLRB 1076 (1975).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[33]

ORDER

Respondent, Anchorage Times Publishing Co., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union sentiments and desires.

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[33] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Causing employees to engage in surveillance of union meetings attended by other employees.

(c) Creating an impression that employees' activities on behalf of the Union are under surveillance by management officials.

(d) Threatening employees with loss of jobs if the Union becomes their bargaining representative.

(e) Questioning job applicants about their union sympathies.

(f) Engaging in a selective hiring practice based upon the union sympathies, or lack thereof, of job applicants.

(g) Granting wage increases so as to influence the results of a secret ballot election by undermining employees support for the Union.

(h) Refusing to continue the employment of Ann Gabler, on a part-time

basis, because of an uncertainty regarding her union sentiments and desires.

(i) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Ann Gabler immediate and full reinstatement to a position in the newsroom, on a part-time basis or, if such a job no longer exists, to a substantially equivalent position on the same part-time basis, without prejudice to her seniority or other rights and privileges, and make her whole, in the manner set forth above in the section entitled "The Remedy," for any loss of earnings she may have suffered by reason of the unlawful discrimination against her.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to analyze and compute the amount of backpay and reinstatement rights due under this recommended Order.

(c) Recognize, effective from the date beginning November 14, 1976, and, upon request, bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local 1547, AFL-CIO, as the exclusive representative of all employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All employees employed by the employer in the circulation, advertising, editorial, and accounting departments, excluding managerial employees, inserters, stringers, confidential employees, guards and supervisors as defined in the Act, and all other employees who are represented in the existing collective-bargaining units by either Anchorage Typographical Union No. 823, AFL-CIO, or International Printing Pressmen and Graphic Communications Union of North America, Local 327, AFL-CIO.

(d) Post at its Anchorage, Alaska facility, as well as at the Palmer and Juneau, Alaska bureau offices, copies of the attached notice marked "Appendix."[34] Copies of said notices, on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's authorized representative,

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[34] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

shall be conspicuously posted by it immediately upon receipt thereof and maintained for 60 consecutive days thereafter in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: May 10, 1978

s/
Gordon J. Myatt
Administrative Law Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-7024
	)	
ANCHORAGE TIMES PUBLISHING CO.,	)	
	)	
Respondent.	)	
	)	

Petition for Rehearing

PETITION OF RESPONDENT

ANCHORAGE TIMES PUBLISHING CO.

Douglas A. Riggs
BOGLE & GATES
900 West Fifth Avenue, Suite 525
Anchorage, Alaska 99501
Telephone: (907) 276-4557

Attorney for Respondent

On February 27, 1981, this court issued a decision and entered a judgment in this case which enforced a bargaining order against the Anchorage Times Publishing Co., the respondent. The bargaining order was a part of a remedy ordered by the Administrative Law Judge (ALJ) on May 10, 1978 and affirmed by the National Labor Relations Board (Board) on August 15, 1978. The respondent petitions this Court for a rehearing on the decision which enforced the bargaining order because the Court has overlooked or may not have had the benefit of a record sufficient to allow adequate consideration of the facts of this case within the "changed circumstances doctrine" of NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979) and Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503 (7th Cir. 1980).

Western Drug stands for the principle that "changed circumstances," such as

employee turn-over and supervisor termination between the date of the election and the conclusion of the trial before the ALJ, must be considered in determining whether a bargaining order is appropriate and suggests that subsequent changes can be considered in that determination. In this petition, the respondent is not relying on the set of facts existing in 1981 as its basis for reconsideration of the propriety of the bargaining order. Rather, within the limitations of Western Drug and Red Oaks, it asks this court to focus on the facts existing when the bargaining order was ordered by the ALJ and affirmed by the Board.[1] Even though the "laboratory

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[1] This Court said in NLRB v. The Coca-Cola Bottling Co., 472 F.2d 140 (9th Cir 1972) that even though turn-over of employees may not militate against the appropriateness of a bargaining, "[It] does not mean that the NLRB cannot or should not reexamine the present circumstances to see whether a fair election could now be held under the protection of the NLRB." 472 F.2d at 141.

environment" at the time of the election may have been tainted[2], the respondent believes the circumstances so substantially changed by the conclusion of the trial and particularly by the time of the ALJ's decision and its subsequent affirmation by the Board that the bargaining order was an abuse of discretion and should not be enforced by this Court.

The changed circumstances establish that there was both a substantial turn-over in personnel[3], not attributable to unfair labor practices of the respondent, and a termination of some "offending" supervisors. First, with respect to employee turn-over, the "excelsior list" contained

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[2] This Court concluded that the respondent's unfair labor practices at the time of the election were not of the "outrageous" and "pervasive" character which almost always warrants a bargaining order. ____ F.2d at 551.

[3] The attached appendix reflects the turn-over of personnel.

185 employees. There were 166 votes cast.[4] By July 26, 1977, at the conclusion of the hearing before the ALJ, 54, or 29.1 percent, of the employees who were on the excelsior list had resigned from their employment. By May 10, 1978, 92 or 49.7 percent, of the employees had resigned from their employment. By August 15, 1978, 108, or 58.3 percent, had resigned from their employment.[5]

Of additional significant import is the fact that of the approximately 14 employees who the ALJ determined had had their Section 7 rights violated, more than 8 had terminated their employment by the

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[4] See note 9, infra.

[5] In Red Oak, there had been a 35 percent turn-over by the time of the hearing, and by the time of the entry of the bargaining order, it had risen to approximately 64 percent. 633 F.2d at 510. That court then went on to state: ". . . turn-over . . . militates against a bargaining order in close cases." Supra at 510.

date of the Board's decision.[6] By July 26, 1977, 3 or 21.1 percent, had resigned, and by May 10, 1978, 5 additional employees had resigned for a total of 8, or 57.1 percent of the total number.[7]

Of equal importance was the termination of supervisors Hamilton, King and Molenda, who the ALJ found to have perpetuated a number of the unlawful acts against the employees. They all terminated their employment by July 26, 1977.[8]

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[6] The 14 employees are: Ed Hein, Ann Gabler, Frank Gerjevic, Jon Matthews, William Wilson, Sarah Wilson, Carl Sampson, Elaine Craft, Elaine Moore, Betty Broste, Mary Kay Brown, Lynn Symonds, Shawn Bonney and Glenn Aikenhead.

[7] In Red Oak, 50 percent of the employees directly involved in the unfair labor practice had left their employment by the time of the hearing. 633 F.2d at 510.

[8] Supervisors Jim Martin and Mike Kennedy terminated their employment on March 18, 1977 and June 28, 1977, respectively. Supervisors Mike Doogan and Jim Donley

Substantial deference to the principle of a secret ballot election and resistance to the mechanical application of a bargaining order is appropriate in this case for two reasons.

First, the issue of a valid majority status is tenuous at best. The regional Director determined that the bargaining unit contained 181 employees. Therefore, a majority required 91 cards. The board found that by November 15, 1976, the Union had obtained 97 authorization cards. However, this Court evidently had doubt as to whether four of the cards should have been treated as valid. _____ F.2d at 552. If these four cards are removed, the margin of majority becomes only 3 cards.

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terminated their employment on August 3, 1977 and September 30, 1977, respectively. Supervisors Les Kiddy and Martha Lloyd terminated their employment on April 1, 1978 and September 7, 1978, respectively.

As to an additional 7 cards, their validity turns not on the intent of the signors, but on whether they could remember if they had been told that the only purpose for the cards was an election. If a finding of majority rests on such a technical interpretation of the evidence, it is very apparent that in a unit of over 181 people, the question of a majority was very close and certainly a situation where the stringent remedy of a bargaining order is not appropriate.

Second, notwithstanding the alleged unfair labor practices, there is no evidence showing a great exodus of support from the union at the time of the election.[9] Consequently, there is no substantial evidence that the impact of the

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[9] There were 185 employees on the excelsior list. 166 employees voted. (The revised tally showed a vote of 87 to 74 against the union with 3 votes undetermined.) The final tabulation showed that 74 employees

unfair labor practices would preclude a fair rerun of the election.[10] Therefore, for the ALJ and the Board to conclude that a fair rerun election was not possible because of the lasting impact of the unfair labor practices is an unreasonable and arbitrary conclusion.

The respondent respectfully requests this Court to reconsider that part of its decision which affirmed the bargaining order. Under the changed circumstances

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voted for the union. Assuming there were 97 valid authorization cards, the 74 employees who cast a ballot in favor of the union constituted 76.2 percent of alleged union adherents. If a necessary and reasonable allowance is then made for those approximately 11 employees who signed a card simply for the purpose of holding an election, then those who voted in favor of the union constituted 86 percent of those who signed authorization cards.

[10] In Red Oaks, 43 of the 78 employees signed authorization cards, and 36 of them, or 83.7 percent, voted for the union. The court there concluded that the lack of exodus suggested the propriety of a new election. 633 F.2d at 510.

of this case, that remedy is neither required nor appropriate. A bargaining order should not be mechanically applied nor be a punitive device.[11] As the Court said in Western Drug:

> By ignoring the turn-over in personnel, the Board denied the present employees the right to choose their bargaining representative. Because the primary objective of the Act is to guarantee employees this right, the Board must not routinely place a premium on deterring employer misconduct. 600 F.2d at 1326.

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[11] Though the respondent does not request this Court to enforce the bargaining order because of the circumstances as they exist today, it nonetheless is appropriate to quote the comments of the business manager of IBEW Local 1547, Mr. Robert Piazza, who was the organizer of the respondent's employees in 1976 and 1977, which were made and reported on February 28, 1981 in the Anchorage Daily News, the competitor of the respondent, following the release of this Court's decision in this case:

> "It's been such a long thing," he said, adding that he did not know if the Times employees were still eager for union representation. "I'm not going to go out and make a

The respondent, in the alternative, suggests that this court has the power, pursuant to Section 10(e) of the Labor Management Relations Act, 29 U.S.C. 160(e), to remand the case to the NLRB for the purpose of adducing additional evidence on the changed circumstances. NLRB v. the Coca-Cola Bottling Co., supra.

Respectfully submitted this 13th day of March, 1981.

BOGLE & GATES

By /s/_____
Douglas A. Riggs
Attorneys for Respondent

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big issue of it." But the IBEW will readily represent the Times employees if that's what they want, he said. (emphasis added)

This court is urged to consider whether the enforcement of the bargaining order serves the interest of the employees or is simply a form of punishment against the respondent. If the bargaining order is enforced, it will affect the present, not the past, employees. Given the explicit doubt contained in Mr. Piazza's comments about the interest of the employees, a better remedy would be a cease and desist order and a rerun election.

SUPPLEMENTAL APPENDIX

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Aikenhead, Glenn G.			
Anderson, Marlene			
Andrews, Christina	X	X	X
Andrews, Susan	X	X	X
Arcury, Edward	X		
Appleby, Wesley R.			
Austin, Jesse C.	X	X	X
Azevedo, Carol M.	X		
Bacolas, Robert J			
Bain, Michael	X	X	X
Baker, Mary Ann	X	X	X
Benson, Carol F.	X	X	X
Bibler, Kathleen	X	X	X
Billings, Garland L.	X		
Billings, Gerald	X	X	X
Billings, Theresa D.	X	X	X
Bonney, Shawn			
Brennan, Marian M.	X	X	X

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Bright, Reginald	X		
Broady, Arthur			
Broste, Betty A.	X	X	X
Brown, Mary Katherine	X	X	X
Bujol, Don Richard			
Burke, Patricia	X	X	X
Campbell, Michael	X		
Chandler, Raymond	X	X	X
Carlson, William	X	X	
Clark, Chloe K.	X		
Cohen, Lisa	X		
Conway, Lynn J.	X	X	X
Cooke, Anita J.			
Coty, Patricia C.	X	X	X
Coughlin, Kerry J.			
Courtney, Michael	X		
Crabtree, Mary Kay			
Craft, Elaine	X	X	X

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Crawford, Maxine	X	X	X
	10	18	19

NOTE: The symbol "X" signifies that the employee was employed on the particular date. The subtotals indicate the number of employees who were no longer employed on the dates shown.

Cunningham, Victoria			
Cutler, Donald A.	X		
Davis, Judy L.			
Delgado, Kathryn	X		
Dick, Gwendolyn	X	X	
Digel, Kathleen	X	X	X
Dougherty, William P.	X		
Durner, Eran	X	X	X
Dye, Mary R.	X	X	X
Epler, Patti	X	X	X
Fejes, William C.			
Ferguson, Charlotte			
Ferrise, Mary Jo	X	X	X

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Fleming, Kathleen	X	X	X
Fortier, Edward J.	X	X	
Fortier, Kris M.	X	X	X
Fostervold, Mark A.	X	X	X
Fuxjager, Richard			
Gabler, Ann			
Gaither, Vondelette D.	X		
Gardner, Lee Ann	X		
Gearhart, Beverly A.	X	X	X
Gerjevic, Frank A.	X	X	X
Gerlock, Patricia	X	X	X
Gillette, Helen	X	X	X
Goodson, Linda Kay	X	X	X
Hall, James W.			
Hancock, Howard	X	X	
Hanger, James L.	X	X	X
Harte, Marshall			
Hauser, Joan			

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Hawkins, Pamela	X	X	X
Hein, Edward	X		
Heiney, Linda A	X		
Heyward, Christopher			
Hildreth, Marilyn	X	X	X
Hill, Carol	X	X	X
Hill, James R.	X		
Hill, Patricia	X	X	X
Hochstatter, Theodore E.	X	X	X
Holder, Joseph	X		
Hood, Norman		X	
Humphrey, Jeannette			
	12	20	24
Hunter, Donald	X	X	X
Jackson, Russell	X		
Jenny, Mary R.	X	X	X
Johnson, Dennis	X		
Johnson, James E.	X		
Johnson, Lana	X	X	X

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Johnson, Troy	X	X	X
Kidd, Karen			
Kim, Gir-Hyun	X	X	X
Klora, David J.	X	X	X
Knudsen, Rachael	X	X	X
Monte, Christina			
Krizan, Carol			
Leasure, Bruce	X	X	X
Leasure, Shanna	X	X	X
Leasure, Sue L.	X		
Leo, Brian			
Leppanen, Francine A.	X	X	X
Lilagan, Cynthia	X	X	
Loman, Nancy	X		
Lowther, Jerriane	X	X	X
Martin, Valerie	X	X	X
Mathews, Jon L.	X		
May, Liisa			
Mays, Willie R.	X		

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
McCullough, Elizabeth	X	X	X
McGuire, Frank	X	X	X
McGuire, John Kevin	X		
MaKay, Patrick M.	X	X	X
Mead, Bette L.	X		
Melarvie, Linda			
Meyer, Myrtle	X		
Mitchell, Brenda	X	X	X
Mitchell, Roy	X	X	
Mitchell, W. Yvonne	X	X	
Mizell, Lonnie			
Moore, Elaine P.	X	X	X
Mosby, Andrea	X		
Mosley, Laura	X	X	X
Nagy, Marilyn			
Nibert, Janet R.			
Norton, Larry			
Ortiz, Jennie			
	11	22	25

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Osgood, Bonnie	X	X	X
Parker, Barbara	X	X	
Parker, Frances K.	X	X	X
Pollock, Susan M.	X	X	X
Puster, Alice	X	X	X
Probst, Cheryl		X	X
Ranstead, Mark B.	X	X	X
Ray, John F.	X	X	X
Redmon, Mary Louise	X		
Richardson, James			
Ridenour, Elizabeth	X	X	
Riggs, Barbara S.			
Rogers, Barbara J.	X	X	X
Ross, Nancy L.			
Running, Barbara L.	X	X	
Rushton, Victoria			
Russell, David			
Sampson, Carl	X		

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Sayers, Arlene	X	X	X
Schiefelbein, Kim M.	X	X	X
Scott, Charles	X	X	
Scott, Georgia	X	X	
Shaffer, Deborah A.	X		
Shaughnessy, Kim S.			
Sheets, Kathleen			
Slabach, Debra L.			
Slone, William			
Smith, David L.			
Smith, Zola			
Smithers, Patricia	X		
Spahr, John	X	X	X
Spellman, Steve			
Spendlove, Rodney			
Spoonamore, Russell	X	X	X
Stanek, Sheryl	X	X	
Story, Christine			

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
Stowers, Gloria			
Swanson, Joyce	X		
Symonds, Lynn	X	X	X
Taylor, Mary H.	X	X	X
Teague, Jaqueline	X		
Thompson, Robert	X		
Trimble, David	X	X	X
	16	22	28
Tuft, Willie			
Tull, Bonnie	X		
Turner, Catherine	X	X	X
Tyson, Raymond	X	X	X
Walker, Vernon			
Watkins, Icie Beatrice	X	X	X
Weatherly, Michael			
Weatherman, Patria	X	X	
Weaver, Joyce C	X	X	X
Wendel, Patricia C.	X	X	X

EXCELSIOR LIST EMPLOYEES 1-4-77	EMPLOYEES AS OF CONCLUSION OF TRIAL 7-26-77	EMPLOYEES AS OF ALJ'S DECISION 5-10-78	EMPLOYEES AS OF BOARD DECISION 8-15-78
West, Cynthia	X	X	
Whaley, Kim			
Williams, Colleen			
Wilson Sarah O.	X		
Wilson, William S.	X		
Woitel, Rhonda A.	X	X	X
Wold, Barbara J.	X		
Young, Jeanne C.	X		
Young, Pamela J.	X	X	X
	5	10	12
GRAND TOTAL			
Total Employees: 185			
Total Employees No Longer Employed on the Dates Shown:	54	92	108

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CLERK

No. 80-2157

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANCHORAGE TIMES PUBLISHING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

EDWARD S. DORSEY
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board reasonably concluded that a bargaining order was necessary to remedy fully petitioner's pervasive unfair labor practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2157

ANCHORAGE TIMES PUBLISHING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-44) is reported at 637 F. 2d 1359. The decision and order of the National Labor Relations Board (Pet. App. D-1 to D-148) are reported at 237 N.L.R.B. 544.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1981. A petition for rehearing was denied on April 29, 1981. The petition for a writ of certiorari was filed on June 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth on pages 2-3 of the petition. Also relevant are the following provisions of the Act (29 U.S.C. 157 and 158(a)):

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. Petitioner publishes the principal newspaper in Anchorage, Alaska, and employs about 280 employees in five departments. In late summer 1976, a group of employees in petitioner's newsroom actively sought a union willing to represent employees in the accounting, advertising, circulation, and editorial departments. In mid-October 1976, this group succeeded in persuading the International Brotherhood of Electrical Workers, Local 1547, AFL-CIO ("the union"), to conduct an organizing campaign among petitioner's employees. (Pet. App. D-25 to D-26.) By mid-November 1976, the union had obtained authorization cards from a majority of the unit employees, and it filed with the Board a petition for a representation election (*id.* at D-3, D-30, D-133).

Petitioner responded to the union's organizing campaign, both before and after the election petition was filed, with a pervasive scheme of unfair labor practices designed to deter employees from supporting the union. These unfair labor practices included: coercive interrogations of employees about their union sympathies, conducted over a period of several months by various high-ranking company officials; surveillance and creating the impression of surveillance of union meetings; threatening employees with job loss if the union won the election; denying an employee (Ann Gabler) part-time work because of her support for the union; and granting 28 employees (15% of the bargaining unit) wage increases two days before the election after delaying or accelerating those increases in order to make them coincide with the election date. (Pet. App. D-88 to D-116, A-9 to A-33.) The union subsequently lost the January 20, 1977, election (*id.* at A-6 to A-7).

2. The Board concluded that these unfair labor practices were sufficient not only to warrant setting aside the election, but also to make it unlikely that a fair rerun election could be held, even with the aid of a traditional cease-and-desist order. Accordingly, the Board, finding that the union had obtained valid authorization cards from 97 of the 181 employees in the bargaining unit at the time the representation petition was filed, determined that under the criteria set out in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969), a bargaining order was an appropriate remedy for petitioner's unfair labor practices. (Pet. App. D-135 to D-148.)

The administrative law judge, whose decision was affirmed by the Board, explained (Pet. App. D-136 to D-137):

> The numerous and persistent acts of unlawful interrogation by higher level management, the selective hiring policy based upon unlawful questioning of job

> applicants or employees seeking to arrange employment interviews for job applicants, the use of employees to engage in surveillance, and the creating of an impression among employees that management was engaging in surveillance of their union and protected activities, as well as the threats of loss of employment are collectively sufficient to warrant a determination that a fair rerun election could not be held. Equally pernicious, in my judgment, is management's manipulative use of the wage review program to undermine [employee] support for the Union and influence the outcome of the election. It is reasonable to conclude that the total cumulative effect of these unfair labor practices, coupled with the additional unlawful refusal to employ Gabler on a part-time basis, will be a lasting one, and the conditions necessary for providing a fair expression of employee sentiment in a rerun election will not be achieved by a traditional cease and desist order.

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-44). The court rejected petitioner's assertion that the union had not obtained authorization cards from a majority of the employees, sustaining the Board's finding that the card solicitors had not represented that the cards were only for the purpose of obtaining an election (*id.* at A-36 to A-40). In upholding the Board's finding that the facts warranted a bargaining order, the court explained (*id.* at A-43 to A-44):

> The wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases—and decreases.

> In addition, we are not persuaded that the harmful effect of the Company's unfair labor practices has been dissipated by the fact that two of the Company's representatives who committed some of the unfair labor practices (supervisors King and Molenda) have left its employ. Several of the unfair labor practices were committed by high level management personnel who did not * * * choose to disavow their coercive conduct before the election. Moreover, the unlawful wage increases were granted by management, not by the departed supervisors. * * * Therefore, it appears unlikely that the effect on the employees of the unfair labor practices of management has been softened by the departure of two supervisors.

The court of appeals denied the company's petition for rehearing (Pet. App. B-1), and its petition for a stay of mandate pending disposition of the instant petition (*id.* at C-1 to C-2).

On June 22, 1981, Justice Rehnquist denied petitioner's further application for a stay of mandate.

ARGUMENT

1. Petitioner contends that the court of appeals improperly upheld the Board's bargaining order without considering "[t]he changed circumstances of turnover in employees and supervisors between the date of the election and the date of the NLRB's decision and order" (Pet. 11). This contention presents no issue warranting review by this Court.

a. The court below did consider petitioner's assertion (Pet. 8) that the termination of three supervisors who perpetrated some of the unlawful acts dissipated the need for a bargaining order. The court found, however, that "high level management personnel" who had committed unfair labor practices remained in petitioner's employ (Pet. App.

A-43 to A-44). Moreover, the court pointed out that the unlawful wage increases—the violation which it found most strongly to require a bargaining order remedy—were not granted by the departed supervisors (*ibid.*).

b. Petitioner's further contention that the bargaining order was unwarranted because of employee turnover is not properly presented here. Petitioner did not raise that issue before the Board, either prior to its decision or in a motion for reconsideration. Since petitioner has not shown any extraordinary circumstances excusing that failure, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from raising the issue before the court of appeals or before this Court. *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255 (1943).

Moreover, petitioner first raised this contention in the court of appeals in its petition for rehearing. Under established policy, this Court will not review legal issues not presented to or considered by the court of appeals. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 (1975). See also *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[1]

2. Thus, the only issue actually presented is whether, on this record, the Board reasonably concluded that a bargaining order was necessary to remedy fully petitioner's unfair

[1]Petitioner alleges (Pet. 7-8) certain facts concerning employee turnover. However, while petitioner appended a list to its petition for rehearing before the court of appeals (Pet. App. E-12 to E-22) which indicated that by the close of the hearing before the administrative law judge certain employees had left its employ, no evidence was introduced at that hearing on the issue of turnover. Similarly, there is no record support for petitioner's assertions as to turnover between May 10, 1978 and August 15, 1978 (the period between the ALJ decision and the Board decision). In view of its belated nature, the court of appeals did not abuse its discretion in denying petitioner's request, made for the first time in the petition for rehearing, that the case be remanded to the Board for an evidentiary hearing on changed circumstances.

labor practices. That issue, which involves only the application of established principles to the particular facts of this case, does not warrant further review.

In any event, a bargaining order was clearly justified here. As the Second Circuit explained in *NLRB* v. *Jamaica Towing, Inc.*, 632 F. 2d 208, 212-213 (1980):

> Certain violations have been regularly regarded by the Board and the courts as highly coercive. These are the so-called "hallmark" violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists. They include such employer misbehavior as the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of § 8(a)(3) of the Act. In such cases the seriousness of the conduct, coupled with the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force. The actual use of a "stick" in the form of a plant closure, or the resort to physical force or discharge, pose no problem of assessing credibility or unlikelihood of implementation. They are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period. The prospect of unionization is not a sure safeguard against such tactics.
>
> * * * * *
>
> Similarly, the employer, by "remedying the very grievances which gave rise to the union interest, . . . destroy[s] for the moment at least the employees' need for

> greater strength . . . [so that] the employees can not be said to have been free to fairly appraise the value of unionization." [Footnotes and citations omitted.]

In the present case, there were several "hallmark" violations. Employees were threatened with job loss if the union won the election, and one employee was in fact denied part-time employment because of her support for the union. Moreover, two days before the election a substantial number of employees in the bargaining unit were granted wage increases, which were announced at that time solely to influence the outcome of the election.[2] As the Board explained in *Tower Records*, 182 N.L.R.B. 382, 387 (1970):

> A unilateral award of a wage increase by an employer following a union's demand for recognition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.

And, as the Board has pointed out in *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240, 1241 (1972), a bargaining order is particularly appropriate in these circumstances because "traditional remedies, which do not include a requirement that the wage increase be rescinded, cannot eradicate the impact of [the employer's] action."

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[2] *J.J. Newberry Co.* v. *NLRB*, 645 F. 2d 148, 153-154 (2d Cir. 1981) (Pet. 6 n.2), in which the court found that a wage increase, although a "hallmark" violation, did not warrant a bargaining order, is distinguishable. In the particular circumstances there, the court found that the increase would not have a coercive impact because it was not based on anti-union animus but was prompted by a higher wage rate established at a store newly opened by the employer. Here, petitioner's anti-union animus was clearly established and the wage increases were granted, or their timing was delayed or accelerated, for the purpose of influencing the election.

In sum, since the employer's unfair labor practices here had resulted in an atmosphere in which "any election * * * would not be likely to demonstrate the employees' true, undistorted desires," the Board properly issued a bargaining order on the basis of the majority support for the union previously reflected in the authorization cards. *NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 611.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

EDWARD S. DORSEY
Attorney
National Labor Relations Board

AUGUST 1981

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No. 80-2157

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ANCHORAGE TIMES PUBLISHING CO., PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. RIGGS
Attorney for Petitioner

BOGLE & GATES
900 West Fifth Avenue
Suite 525
Anchorage, Alaska 99501
Telephone (907) 276-4557

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-2157

ANCHORAGE TIMES PUBLISHING CO., PETITIONER,

v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

1. The assertion made by the respondent in its brief that the issue of "changed circumstances" was first raised by the petitioner, Anchorage Times Publishing Company, before the Ninth Circuit in its petition for rehearing (Resp. 6) is not correct. The petitioner raised the issue in a supplemental brief before oral argument was heard by the court. By letter dated April 29, 1980,[1] the petitioner supplemented its argument by specifically referring to the issue of "changed circumstances" and citing in support the opinion styled *NLRB v. Western Drug*, 600 F.2d 1134 (9th Cir. 1979). In addition, the issue of changed circumstances, including employee turnover, was a part of the petitioner's oral argument before the court. Therefore, the

---

[1]The petitioner has requested the Clerk of Court, Ninth Circuit Court of Appeals, on July 24, 1981 to certify and transmit that letter as a part of the record to this Court.

respondent's contention that the issue of changed circumstances is not properly presented to this court is incorrect.[1]

2. Petitioner believes the issue of changed circumstances should have been considered and applied by the Ninth Circuit. Moreover, even if the "hallmark violation test" of *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980), is applied, as suggested by the respondent (Resp. 7-8), it is deficient in supporting the enforcement of a bargaining order because there exists a "significant mitigating circumstance" of changed circumstances, including employee turnover, management turnover and lapse of time. Changed circumstances, including "passage of time" and new employees, were sufficient factors in the very recent opinion of the Sixth Circuit to weigh against the enforcement of a bargaining order, notwithstanding the existence of unfair labor practices similar to those found to have been committed by the petitioner. *NLRB v. Frederick's Foodland*, 107 L.R.R.M. 3216 (6th Cir. 1981).

Respectfully submitted,

DOUGLAS A. RIGGS
Attorney for Petitioner

AUGUST 1981

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[1]The petitioner does not take the position that the ALJ or the NLRB erred in not considering the changed circumstances of employee turnover for the simple reason the issue was not before them. The magnitude of employee turnover was not known at the time of trial before the ALJ nor at the time the ALJ's recommendation was considered by the NLRB. However, on the petition to review and cross-application to enforce the decision of the NLRB, the petitioner asked the Ninth Circuit to either consider the changed circumstances and/or order additional evidence be taken pursuant to 29 U.S.C.A. § 160(e).